TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible].

No. [illegible] 231.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PETITIONER,

vs.

BUD E. LATTA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY [illegible]. CERTIORARI AND RETURN FILED APRIL [illegible].

(23,549.)

(22,549.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 523.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PETITIONER,

vs.

BUD R. LATTA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1911.

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No. 928.

(Certified.)

Transcript of Record.

United States Circuit Court of Appeals, Eighth Circuit.

No. 3444.

Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Plaintiff in Error,
vs.
Bud R. Latta, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Nebraska.

Filed July 15, 1910.

1 Pleas Before the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, Sitting in the Circuit Court of the United States for the District of Nebraska, Within the Eighth Judicial Circuit, at the April, 1908, Term of the Omaha Division of said Court.

Be It Remembered, That on the 16th day of April, 1908, a Second Amended Petition was filed in the case of Bud R. Latta vs. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, which said Second Amended Petition is in words and figures following, to-wit:

In the United States Circuit Court for the District of Nebraska, Omaha Division.

Bud R. Latta, Plaintiff,
vs.
The Chicago, St. Paul, Minneapolis and Omaha Railway Company, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Wisconsin and Doing Business in the State of Nebraska, Defendant.

Second Amended Petition.

Comes now the plaintiff and for cause of action against the defendant herein alleges:

That the Chicago, St. Paul, Minneapolis and Omaha Railway Company is now and at all times hereinafter mentioned has been a corporation chartered, organized and existing under and by virtue of the laws of the State of Wisconsin and doing a general railway business in the State of Nebraska; that the said defendant before and at the time of the delivery of the goods and chattels hereinafter next mentioned was, and from thence hitherto hath been, and now is a common carrier of goods and chattels for hire, from the City of Tekamah in the County of Burt, and the State of Nebraska, to the City of Omaha, in the County of Douglas, and State of Nebraska, and elsewhere in said State and neighboring States.

The plaintiff herein further alleges that while the said defendant was such common carrier as aforesaid, the said plaintiff, Bud R. Latta, heretofore, to-wit: on or about the ninth day of May, 1907, at the City of Tekamah, Burt County, Nebraska, aforesaid caused to be delivered to said defendant and the said defendant then and there accepted and received of and from the said *defendant* certain
2 goods and chattels of the said plaintiff, to-wit: two horses of great value, one being a mare and the other a colt of, from and by the side of said mare herein mentioned, to be safely and securely carried and conveyed by the said defendant from the said city of Tekamah, Nebraska aforesaid to the City of Waterloo, in the State of Iowa, and there, to-wit: at the said City of Waterloo, Iowa, aforesaid safely and securely to be delivered to one Joe McCaughlin for plaintiff, for a certain reasonable reward paid to said defendant by the plaintiff herein in that behalf; that the said mare and colt so by plaintiff delivered to and accepted by defendant for the purpose set out above were both of thoroughbred racing stock; that said mare had shown more than ordinary speed on the race course and that by reason of her breeding, speed, disposition and form in racing was of great value to plaintiff as a racing and brood mare and fairly and reasonably worth the sum of $2500, and that the said colt by reason of its breeding and promise was fairly and reasonably worth the sum of $500.00. And plaintiff further says that upon such delivery and acceptance it then and there became and was the duty of said defendant to take due and proper care of said goods and chattels and in and about the carriage and conveyance of the same and the delivery thereof as aforesaid.

Plaintiff further says that the said defendant not regarding its duty to take due and proper care of said mare and colt and to take due and proper care in the carriage and conveyance of same on or about said ninth day of May, 1907, and while said mare and colt were in its possession and under its control took so little and such bad and improper care in the carriage and conveyance of said mare and colt and of the car in which said mare and colt were being conveyed on and over defendant's railroad, and so carelessly and negligently behaved and conducted itself in and about the carriage and conveyance of the same, that the car in which said mare and colt were being conveyed over the said defendant's railroad was permitted to catch on fire and the said mare and colt were thereby burned to death on the day, month and year above mentioned and while in the custody of the said defendant as aforesaid to plaintiff's damages in the sum of $3000.00.

Plaintiff further says that said car, at the time it caught on fire was a part of a train being moved by defendant over defendant's line of railroad, drawn by a steam engine. That said engine was so constructed and operated as to permit the escape of cinders and burning coals of fire from the smoke stack thereof and that said fire originated by reason of a burning cinder, escaping from said
3 smoke stack and alighting upon the roof of said car, causing
the same to ignite, and plaintiff avers that defendant was guilty of negligence in that behalf, in that it used and operated in propelling said train, a steam engine, so constructed and operated as to permit the escape of cinders and coals of fire, large enough to communicate fire to the roof of said car, and in not so constructing, equipping and operating said engine that coals of fire could not escape therefrom.

Plaintiff further alleges that at the time the said car, in which said mare and colt were being conveyed, caught on fire, the train of which this car formed a part, was on the main line of defendant's railroad about one and one half miles north of a station called Tyson in Washington County, Nebraska; that on discovery of the fire the train was brought to a full stop and plaintiff, who was riding in the caboose, immediately ran to and entered the car in which his said mare and colt were confined. At the time plaintiff entered said car the roof, of one end of the car only, was on fire and the mare and colt were in that end of the car and up to that time entirely uninjured. Plaintiff immediately drove the said mare and colt to the other end of the car and as rapidly as possible was endeavoring to get them out of the car by opening the door and causing them to jump therefrom.

Plaintiff further alleges that at the place where said car was then standing he would have been able to so remove the mare and colt from the car without injury to either thereof, but that immediately after plaintiff had opened the car door preparatory to removing said animals -from, in the manner aforesaid, the defendant's servant and agent, the conductor of said train, with full knowledge of the facts hereinbefore recited and without notice or warning to plaintiff of his intention to do so, caused the train immediately behind this car to be uncoupled and started rapidly toward said station of Tyson and by so doing prevented plaintiff from removing the said mare and colt from said car. That just as the engine started, with the portion of the train containing said burning car, the conductor in charge of said train called to plaintiff to leave the car. Plaintiff says that he still endeavored to remove his said horses from the car by driving them to the door thereof, but that the movement of the car and the spread of the fire caused thereby, compelled him to abandon said effort and to jump from the car for his own safety. That defendant by its servants and employees took the said car a distance of one and one-half miles to the side track at Tyson and that
4 when said car reached said point said mare and colt were destroyed by the fire. Plaintiff further says that had he not been prevented from so doing by the acts of defendant as above that he could have removed the said mare and colt from the burning car

free from harm and that by and through, as a direct and proximate result of the improper and negligent acts of the defendant in so removing said car to the side track at Tyson he was prevented from saving his said mare and colt and has suffered the damages herein above set out in the said sum of $3000.00.

Plaintiff further alleges that on said ninth day of May, 1907, and at the time when he so delivered to said defendant and said defendant so accepted the mare and colt herein set forth for transportation over its lines as aforesaid that he paid to the defendant herein for the service so to be performed by it the sum of $24.38; that by reason of defendant's negligence in permitting said mare and colt to burn that the work contemplated by both parties hereto and on the part of said defendant to be performed was not in fact performed and the money so as aforesaid paid to defendant was not in fact earned by said defendant or any part thereof to plaintiff's damage in the said sum of $24.38.

Plaintiff alleges that by reason of the premises herein he has suffered damages in the sum of $3024.38, no part of which has been paid.

Wherefore, plaintiff prays judgment against the defendant herein in the said sum of $3024.38, together with interest thereon at the rate of seven per cent per annum from the ninth day of May, 1907, and for his costs herein expended.

BUD R. LATTA,
By HOPEWELL & HOPEWELL AND
H. C. BROME, *His Attorneys.*

STATE OF NEBRASKA,
Burt County, ss:

Bud R. Latta being first duly sworn deposes and says that he is the plaintiff in the above entitled matter, that he knows the contents of the above and foregoing petition and that the statements of fact therein made are true as he verily believes.

BUD R. LATTA.

Subscribed in my presence and sworn to before me this 14th day of April, 1908.

[SEAL.] W. M. HOPEWELL,
Notary Public.

5 Endorsed: Filed Apr. 16, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 17th day of April, 1908, Answer to Second Amended Petition was filed in said case, which said Answer is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

BUD R. LATTA, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Defendant.

Answer to Amended Petition.

Comes now the defendant in the above entitled case, and for answer to the amended petition of the plaintiff, states to the Court:

(1) It admits that it is a railway company, organized as alleged in the amended petition, and doing business in the State of Nebraska, as a common carrier from the city of Tekamah, to the City of Omaha, Nebraska, and also into other states, particularly the State of Iowa.

Defendant further admits that on or about the 9th day of May, 1907, it received from the plaintiff two horses, one being a mare and the other a colt, to be transported by the defendant and by other connecting carriers from the City of Tekamah, Nebraska, to the City of Waterloo, in the State of Iowa, there to be delivered to Joe McLaughlin.

Defendant further admits that the said mare and colt were, on or about said 9th day of May, 1907, burned to death while in transit, in possession of the defendant company.

(2) Defendant denies each and every other allegation contained in the plaintiff's amended petition.

(3) For a further and separate defense, defendant alleges that it is an interstate carrier and subject to the regulation and control of the United States and the laws of Congress in relation to interstate carriers, and that the transportation of the mare and colt mentioned in the plaintiff's amended petition, was undertaken as a part of an interstate carriage; that under and by virtue of the laws of the United States pertaining thereto, the defendant is required to file with the Interstate Commerce Commission, and to publish, its schedule of rates and charges, together with all rules and regula-
6 tions in any way or manner affecting the charges to be made
for such transportation of persons or property, or which in any way affect the charges therefor, or for any service connected therewith; and that under and by virtue of the laws of the United States the defendant is prohibited from charging or collecting a greater or less or different consideration from that named in said tariffs, as filed with the Interstate Commerce Commission, and that any and all shipments of an interstate character made by the defendant Company are subject to the laws of the United States and are under and in accordance with the rules and regulations of the published tariffs of the defendant Company, which are filed with the Interstate Commerce Commission.

That in accordance with the requirements of the laws of the

United States, the defendant did, prior to the date of the transaction complained of in plaintiff's amended petition, file with the Interstate Commerce Commission, as required by law, and did publish, as required by law, its schedule of rates and charges and its rules and regulations applying to the shipments of freight, and particularly in respect to live stock, which in any way changed or affected or determined any part of such rates and charges or the value of the service rendered the consignee or the shipper.

Defendant further alleges that under and by virtue of its rules and regulations and tariffs, which were at said time on file with the Interstate Commerce Commission and published according to law, and in force at said date, it was specifically provided as follows:

"Limitation of Liability.—Rates provided on Live Stock will apply on shipments made at owner's risk, with limitation of liability on the part of the railroad company as common carrier, under the terms and conditions of the current live stock contract provided by said company, the contract to be first duly executed in manner and form provided therein.

"150 per cent of the rates named in this Tariff will be charged on shipments made without limitation of carrier's liability at common law, and under this status shippers will have the choice of executing and accepting contracts for shipments of live stock with or without limitation of liability, the rates to be made as provided for herein."

Defendant further alleges that under and by virtue of the tariffs of the defendant company and the Western Classification No. 42, duly adopted, filed with the Interstate Commerce Commission 7 and published as required by law, and in effect at the time of the shipment complained of, it was provided, among other things that the

"ratings given below are based upon values declared by shippers, not exceeding the following, under contract: Each Horse or Pony (gelding, mare or stallion), Mule or Jack $100.00. Each Colt, (under one year $50.00. * * * Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 lbs. or car for each 100 per cent or fraction thereof, of additional declared value per head; animals exceeding in value $800.00 per head or when no value is given will be taken only by special arrangement. * * *

Live Stock, L. C. L. (limited liability under contract, at values stated above), the following estimated weights (Exception to Rule 1) viz: One Horse (gelding or mare), or pony, Mule or Domestic Horned Animal (except bulls), N. O. S., 2,000 lbs.; two animals, 3,500 lbs."

Defendant further alleges that it received the said mare and colt only under the conditions as named in said published tariffs and classification, for the purpose of an interstate shipment, and that by virtue of the said tariffs and classification and rules of the defendant company, duly filed with the Interstate Commerce Commission and published according to law, the rate upon the said mare from Tekamah, Nebraska, to Waterloo, Iowa, when shipped in accordance with the rules and regulations heretofore set forth, under contract for the declaration of value to the amount of one hundred dollars ($100.00) was thirty cents per hundred pounds, from Tekamah, Nebraska, to Council Bluffs, Iowa, over the lines of the defendant and the Chicago & Northwestern Railway Company, where connection is made with the Chicago Great Western Railway Company, a connecting carrier, and upon the colt forty-five cents per hundred pounds.

Defendant further alleges that it received said mare and colt only in accordance with the terms of its said published tariffs and upon a written contract with the plaintiff, wherein and whereby the said plaintiff declared the value of said mare and colt to be one hundred dollars per head, and that the defendant Company would not have received said mare and colt for transportation at the rates agreed upon in said contract except upon the terms and conditions as named in the published tariffs of the defendant Company and upon the execution of the contract before referred to and the release or declaration of value of one hundred dollars per head; and that said defendant company received said mare and colt and agreed to transport the same as a part of an interstate shipment only upon 8 the representations and agreements of the plaintiff, whereby the valuation of said animals was declared to be one hundred dollars each; and that by reason of the said premises and by reason of said contract and representations the said plaintiff did assume all risks in excess of the said declared valuation of one hundred dollars each. A copy of said contract, which is contained in two separate papers, one being denominated a shipping order, duly signed by the plaintiff herein, and the other a live stock contract, are hereto attached, marked, respectively "Exhibit 'A' and "Exhibit 'B' " and are made a part hereof as fully as though herein set forth at length.

Defendant further alleges that it received said stock only upon the terms and conditions named in said contract and upon the terms and conditions in its said published tariff, and agreed to transport the same only upon said terms, relying upon the agreement made by the said plaintiff and the valuation declared by the plaintiff in said contract; and that it would not have received said stock under the terms of said contract for shipment at the rate named in said contract except upon the execution thereof before shipment, and that by reason of the premises herein the plaintiff is estopped from claiming or asserting that the loss and damage which arose by the killing of said animals exceeded the sum of two hundred dollars ($200.00).

Defendant further states to the Court that under and by virtue of the laws of the United States Government controlling the defendant Company, in relation to shipments between different states, and particularly in relation to the shipment of the animals in question in this action, it is prohibited from paying, and it would be unlawful for it to pay, the plaintiff any sum in excess of the sum of two hundred dollars; and that any acts of the Legislature of the State of Nebraska, and any and all provisions of the Constitution of the State of Nebraska, in any way affecting or attempting to affect the rights and contracts between the defendant and plaintiff, growing

out of the shipment upon which this suit is brought, are in vio-
lation of the Constitution of the United States, and are illegal and
void, as interfering with the rights of the defendant to contract in
relation to said shipment, and illegal and void as an attempt to regu-
late interstate commerce and the terms upon which said commerce
moves, and particularly in conflict with the laws of the United
States, being an Act of Congress entitled "'An Act to amend
an Act entitled 'An Act to Regulate Commerce,' approved Feb-
ruary fourth, eighteen hundred eighty-seven, and all Acts
9 amendatory thereof, and to enlarge the powers of the Inter-
state Commerce Commission,'" approved June 29th, 1906.

Wherefore, defendant asks that it may go hence without day and have and recover its costs herein expended.

CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY,
By B. T. WHITE,
B. H. DUNHAM &
C. C. WRIGHT,
Its Attorneys.

STATE OF NEBRASKA,
County of Douglas, ss:

C. C. Wright, being first duly sworn, on oath deposes and says that he is one of the duly authorized attorneys for the Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant in the above entitled action; that said defendant is a corporation, for which reason he makes this verification; that he has read the above and foregoing answer and knows the contents thereof, and that the statements and allegations therein contained are true, as he verily believes.

C. C. WRIGHT.

Subscribed in my presence and sworn to before me this 15 day of April, A. D. 1908.

[SEAL.]

LYLE E. JACKSON,
Notary Public.

Form 59. 2 M Bks.

EXHIBIT "A."

See Contract on Back of this Shipping Order.

Chicago, St. Paul, Minneapolis & Omaha Railway Co.

Shipping Order.

(To be Retained by Agent.)

Car No. CGW. No. —.
Initials of Car 5721.

TEKAMAH STATION, 5/9, 1907.

(The shipper may elect to accept the conditions printed on the back hereof and as contained in the Bill of Lading of which this

Shipping Order is a part, or may, as provided below, require the carriage of property at "Carrier's Risk").

Receive, carry and deliver the articles described below, in accordance with the Tariff and Classification in effect at the date of this order and subject to the conditions of the Bill of
10 Lading of which this Shipping Order is a part. (For Carrier's Liability see note below.)

Consignee, Destination, Marks And Routing.	Articles.	Weight.
Joe McLaughlin, Waterloo, Iowa.	1 Horse. 1 Colt under one year.	2000 Subject 750 to correction.
	ORel to Cont. val. S. L. & C. Paid to Apply $24.38.	
Charges Advanced.		

B. R. LATTA, *Shipper.*

(In red ink across the face:) Grain subject to Elevator Delivery.

If the Shipper elects not to accept the said tariff rates and conditions, he should so notify the Agent of the receiving carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to the conditions of the Bill of Lading of which this order is a part, in order to secure the reduced rates thereon. Property carried not subject to the conditions of the Bill of Lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States, and of the several states in so far as they apply. Property thus carried will be charged at the higher rating provided in Current Tariffs and Classifications to apply when not shipped subject to the conditions of the Bill of Lading of which this is a part, and the cost of marine insurance will be added over any part of the route that may be by water.

The Bill of Lading for the property covered by this Shipping Order is Not Negotiable. If the word "Order" is written on the Bill of Lading immediately before or after the name of the party to whose order the property is consigned, the surrender of the Bill of Lading, properly endorsed, shall be required before the delivery of the property at destination.

C-15.

Conditions and Rules Forming Part of the Within Contract.

1. The property described herein is to be transported by the Chicago, St. Paul, Minneapolis & Omaha Railway Company to the destination named hereon, if on the rails of said Chicago,
11 St. Paul, Minneapolis & Omaha Railway. If said destination is not on the line of said Company, then to point of con-

nection with Railway or other Transportation Line necessary to complete delivery to destination shown, and it is expressly stipulated and agreed that the above property is transported on the conditions endorsed hereon, which form part of this contract and of the consideration for carrying same, and not otherwise.

And the Company is not to be held liable for the loss of said property, or for any damage or injury to same, or for any delay thereof, by any carrier, carmen or freightmen, after the same has been unloaded at destination shown hereon if said destination is on the rails of said Chicago, St. Paul, Minneapolis & Omaha Railway, or after delivery to any Railway or other Transportation Company necessary to complete delivery to destination shown. But in case of loss, damage or delay to said shipment, or any part thereof, the carrier upon whose line same shall occur shall be held to be liable to the same extent only as this Company would in case of loss on its line.

2. Freight stored at destination at request of or for convenience of owner will be charged for at the rates specified in the published schedules of the corporation.

3. The delivering Carrier, whether for transportation or switching, may make such reasonable charges for the use of any car, or of its track (and add such charges to all other charges hereunder), as shall be provided for by the customs, rules and regulations of such delivering carrier, and such charges shall be a lien on the property transported hereunder.

4. The corporation will not receive or carry any Bank Bills, Drafts, Notes, Deeds, Contracts, evidence of property or other writings, or be responsible for their loss or injury.

5. No conductor or other Agent of the Corporation is authorized to take charge of Bank Notes, Money, or other valuable papers or things, for or on account of the Company, or to receive any perquisites or reward, for himself or for the Company, on or for such articles.

6. Gunpowder and combustible articles of any description will be taken only on special terms and rates. If found secreted among other goods they will be taken from the cars and stored. In case of damage in consequence of the same being so secreted, the shipper or consignor will be held liable.

7. Articles will not be received for transportation unless properly packed in suitable Casks, Boxes, Bales or Packages;
12 and each must be well and clearly marked With the name of
the Consignee and of the Station where they are to be delivered; otherwise they will not be receipted for, in which case no damage for loss or miscarriage, will be paid. The Company will in no case be responsible for loss, injury, or damage which might have been avoided by skillful and more careful and sufficient packing, or which occurs without the negligence or fault of the Company or its agents. All property is subject to cooperage when necessary.

8. This Corporation will not be responsible for damage occasioned by delays from storms, accidents or unavoidable causes; or by decay or injury to fruit, fish, dressed hogs, dressed poultry or other perishable property; or from injury to property produced by frost, heat, or

the elements; and the Corporation will not be liable for the non-delivery of such property in any certain time, nor in time for any particular market.

9. The Corporation will not undertake or agree to carry property by any particular train, nor in time for any particular market, nor are they to be responsible for loss or damage arising from any delay or stoppage, however occasioned; but they will forward the same with as reasonable dispatch as the general business of the Corporation will permit.

10. The Corporation will only be liable as warehousemen, after the property has been placed in their freight depot. But for loss or damage of property by fire, while in their freight depot or storehouse, the Company will not be liable.

11. The Corporation will not be responsible for any loss or injury happening or occasioned by unruly or vicious horses, cattle, swine or sheep, nor for accidents to the same in loading, carrying or unloading the same; nor for any damages, however caused, to live stock or animals of any description, transported or carried upon their railway, or in their cars or vehicles.

12. The Corporation will not be responsible for loss or damage to any article by fire or otherwise, the bulk of which renders it necessary to be forwarded in open cars.

13. Goods or property consigned to any place off the Company's line of road, or to any point or place beyond its termini, will be sent forward with as reasonable dispatch as the general business of the Corporation, at its warehouse within mentioned, will admit by a carrier or freightman, when there are such known to the station agent at said warehouse, willing to receive the same unconditionally for
transportation, the Company acting for the purpose of de-
13 livery to such carrier or freightman, as the agents of the
consignor or consignee, and not as carriers. The Company
will not be liable or responsible for any loss, damage or injury to property after the same shall have arrived at the within mentioned Company's station for delivery to the owner, consignee or to the connecting carriers or freightmen for transportation.

14. No station agent or clerk has authority to alter or vary — of these Rules and Conditions.

15. In consideration of the acceptance and transportation of freight to stations at which there is no railway agent, which is done solely for accommodation of the shipper or consignee, it is agreed that freight so carried may be put off on the arrival of trains, and shipper assumes all risk of loss or damage to the goods after being so unloaded.

No. 16. Owner's Risk. All property received and shipped O. R. (meaning owner's risk) is shipped subject to the conditions printed on the back of this receipt, and to all conditions, specified in general tariffs and classifications, and at a reduced rate by reason of the acceptance of such conditions. If the shipper does not accept such conditions he must give notice to the agent at the time of signing shipping bill, and by so doing may have goods forwarded subject only to conditions imposed by law, in which case additional charges will be made, as provided in general tariffs and classifications.

EXHIBIT B.

Form 79. 10 M 11-12-06.

Read This Contract.

Chicago, St. Paul, Minneapolis & Omaha Railway Co.

It is the desire of this Company that this contract shall be executed on all shipments of Live Stock in carload lots or less. In case shipper declines to execute this contract, the valuation of the Live Stock, as stated by the shipper, shall be stated on the shipping bill, and in such case the rates will be 10 per cent higher than they would be under this contract if he executed it. If the shipper declines either to state the value of the Live Stock on the shipping bill or to execute this contract, the charges in that case will be 10 per cent higher than the rates provided in this contract when the owner or shipper declares the value of the stock to be over $800 per head or declines to declare its value.

Different Kinds Of Live Stock must not be loaded together in the same car (except as provided for in the classification or by special instruction.

14 For Rules Covering The Passage Of Men With Live Stock See Issues of General Freight Department.

Persons In Charge Of Live Stock Are Prohibited From Getting On Or Off Cars Or Walking Over Them While They Are Moving.

No Passes Will Be Given By Any Agent where Live Stock is loaded and shipped. He will enter on the back of this contract the names of the owners or Bona Fide employés who, as herein provided, are entitled to ride free, and only such as are in actual charge of and accompanying the stock. Such entry will be authority of conductor to pass them with stock. He will refuse to enter any others, without regard to the passes permitted to the number of cars. No persons will be allowed to ride in the car with the stock, but must ride in the caboose attached to the train. No free passage upon any train of this Company will be given on account of stock shipments except as above specified.

A. W. TRENHOLM,
General Manager.

E. B. OBER,
General Freight Agent.

Nos. of Way-Bills.	Initials and Nos. of Cars.	No. and Kind of Animals in each Car. Shipper's Count
C. G. W.	5721.	1 Horse.
		1 Colt
		7501½
		S. L. & C.

Live Stock Contract.

TEKAMAH STATION.
5/9, 1907.

This Agreement, Entered into on the day above stated, between the Chicago, St. Paul, Minneapolis & Omaha Railway Company and B. R. Latta,

Witnesseth, That the said Railway Company has this day received from the said B. R. Latta one horse to be transported from

Tekamah, Nebr., station to Waterloo, Ia. Station, consigned to Joe McLaughlin at D. O. at the rate of trf. per cwt., upon the terms and conditions following, that is to say:

The property described herein is to be transported by the Chicago, St. Paul, Minneapolis & Omaha Railway Company to the destination named hereon, if on the rails of said Chicago, St. Paul, Minneapolis & Omaha Railway. If said destination is not
on the line of said Company, then to point of connection
15 with Railway or other Transportation Line necessary to com-
plete delivery to destination shown, and it is expressly stipulated and agreed that the above property is transported on the conditions endorsed hereon, which form part of this contract and of the consideration for carrying same, and not otherwise. And the Company is not to be held liable for the loss of said property, or for any damage or injury to same, or for any delay, thereof, by any carrier, carmen or freightmen, after the same has been unloaded at destination shown hereon if said destination is on the rails of said Chicago, St. Paul, Minneapolis & Omaha Railway, or after delivery to any Railway or other Transportation Company necessary to complete delivery to destination shown. But in case of loss, damage or delay to said shipment, or any part thereof, the carrier upon whose line same shall occur shall be held to be liable to the same extent only as this Company would in case of loss on its line.

The said Railway Company shall not be liable for the loss or death of, or any injuries received by, any of such stock, unless the same is immediately caused by the willful misconduct or the actual negligence of the said Company, or its agents, servants or employés.

The rates provided in the tariffs of this company are based upon the following value of animals named, to-wit:

One hundred dollars per head on each horse or pony (gelding, mare or stallion), mule or jack.

Fifty dollars per heard on each ox or bull.

Thirty dollars per head on each cow.

Ten dollars per head on each calf or hog.

Three dollars per head on each sheep or goat.

And if this shipment is moved at the tariff rate it is agreed that the value of the animals shipped does not exceed, of their kind, per head the above named valuation.

If the shipper declares a value in excess of the above valuation, and this shipment is moved at a rate based thereon, it is agreed that the value of the animals shipped does not exceed such declared valuation, which is as follows:

Each horse or pony (gelding, mare or stallion), mule or jack, per head	$100.00
Each ox or bull per head	$
Each calf or hog, per head	$
Each cow, per head	$
Each sheep or goat, per head	$

16 The shipment covered by this contract is accepted and forwarded subject to the agreed valuation, and the rate of freight

is based on the condition that the Railway Company assumes liability only to the extent of such agreed valuation.

When the declared value exceeds the valuation on which the tariff rate is charged, an addition of 25 per cent will be made to such rate for each 00 per cent or fraction thereof additional declared value per head up to $800.00 per head. When the owner or shipper declares the value to be greater than $800.00 per head, or declines to declare the value of the stock, charges will be based upon 200 per cent of the rate provided above, based on value of $800.00.

The said shipper agrees to load, unload and reload all said stock at his own expense and risk, and to feed, water and attend the same at his own expense and risk while it is in the stock yards of the said Company, awaiting shipment, and while on the cars, or at feeding or transfer points, or where the same may be unloaded for any purpose.

The said shipper himself assumes the duty of properly and securely placing all the said stock in the cars, and of keeping such cars securely locked and fastened, so as to prevent escape by such stock therefrom.

In case the said Railway Company shall furnish any laborer or laborers to assist in loading or unloading said stock at any point, no additional charge will be made therefor, and such laborer or laborers shall while so engaged be deemed as exclusively the employés of the said shipper; and the said Company shall not be liable for anything done, or omitted to be done, by such laborer or laborers, while so engaged.

The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss of or injury to any of said stock, he will give notice in writing or by telegraph of his claim therefor to some officer of said Railway Company or its nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock.

The said shipper hereby accepts for transportation and acknowledges and admits the cars furnished by said Railway Company to be sufficient and suitable cars in every respect for the shipment of said stock, and hereby assumes all risk of injury which the animals, or either of them, may receive in consequence of any of
them being wild, unruly or weak, or maiming each other or
17 themselves, or in consequence of heat or suffocation, or other
ill effects of being crowded in the cars, or injury by the burning of straw, hay or other material placed in the car or used for feeding the stock or otherwise, from all risk of damage which may be sustained by reason of any delay in such transportation, and all risk of escape of any portion of said stock, or loss or damage from any other cause or thing, not resulting from the willful negligence of the said Railway Company.

The car wherein the said stock is to be carried having been tendered to the said shipper by the said Railway Company for that purpose, the said shipper hereby agrees that such car — fit and proper for the purposes of such transportation.

The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of this Company, to whom the said property may come for the purpose of transportation to destination.

The said shipper shall not be entitled to free transportation for himself or his employés by virtue of this contract, except in accordance with the rules issued by General Freight Department, all of which rules and regulations are made part of this contract and are agreed to by shipper.

C. H. HAMBLIN, Jr., *Agent.*
B. R. LATTA, *Shipper.*

Note.—When shipper accompanies shipments, contract will be issued in duplicate, original being sent to Assistant Claim Agent, and duplicate handed shipper. When shipper does not accompany shipments original contract alone will be issued, same being sent to Assistant Claim Agent.

*Agents must fill out this contract very carefully and complete.

Endorsed on back as follows:

Chicago, St. Paul, Minneapolis & Omaha Railway Co.

Stock Contract.

Nos. of Cars —.

Men actually in charge of and accompanying within named stock are required to write their own names in ink or in indelible pencil here.

....

18 Men in charge have written their own names above.

......................., *Agent.*

.... *Station.*

Note.—Agents will permit only the signatures of owners or bona fide employés, who accompany the stock, to be entered on back of contract, running pen through remaining lines.

Men actually in charge of Live Stock will be required to ride in the Caboose Car attached to the train, and are prohibited from getting on or off cars or walking over them while they are moving.

Note to Conductors.

Make cancellations in space provided, as per directions given concerning the cancellation of tickets.

No stop-off checks will be given on this contract.

Conductors must take up this contract when used for return passage from point where Drover's Return Passes are not issued.

To be signed in Conductor's presence for return passage.

....

Cancel Here.

Signatures must correspond with those made at forwarding station.

A. W. TRENHOLM,

Gen'l Manager.

E. B. OBER,

Gen'l Freight Ag't, St. Paul Minn.

In order to have benefit of return passage as provided in circulars referred to above, contracts must be presented for return passage
when issued, on shipments of Horses or Mules within 30 days,
19 and other stock within 3 days after stock has arrived at destination. Return passage to commence within 24 hours
after contract is stamped and signed by Receiving Agent.

....

(This blank will be filled in by agents for the return passage of men in charge of Live Stock at stations where Drover's Return Tickets are not furnished.)

Good for Return passage of

....

From .... To ....

If used on or before......... ....

Agent at......... ....

Stamp.

Cancel Here.

20 This contract is not good for Return passage from Minneapolis, St. Paul, Duluth, Superior, Sioux City or Omaha.

Agent must in all cases punch description before allowing contract to leave his office.	Description of Man In Charge.	
	Size	
	Slim	*
	Medium	*
	Stout	*
	Height	
	Tall	*
	Medium	*
	Short	*
	Hair	
	Light	*
	Gray	*
	Dark	*
	Red	*
	Beard	
	Mustache	*
	Chin	*
	Side	*
	Full Beard	*
	None.	*

	Description of Man In Charge.	
Agent must in all cases punch description before allowing contract to leave his office.	Size	
	Slim	*
	Medium	*
	Stout	*
	Height	
	Tall	*
	Medium	*
	Short	*
	Hair	
	Light	*
	Gray	*
	Dark	*
	Red	*
	Beard	
	Mustache	*
	Chin	*
	Side	*
	Full Beard	*
	None.	*

Endorsed: Filed Apr. 17, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 23rd day of April, 1908, Reply to Answer to Second Amended Petition was filed in said case, which said Reply is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

Bud R. Latta, Plaintiff,
vs.
Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendant.

Reply to Answer to Second Amended Petition.

22 Comes now the plaintiff herein and for reply to the answer of defendant to plaintiff's second amended petition:

1st. Denies each and every allegation in said answer contained not herein by this reply specifically admitted.

2nd. For further reply this plaintiff admits that defendant is engaged in interstate commerce and with respect to such commerce is subject to the regulation and control of the laws enacted by the Congress of the United States. Admits, that defendant is required to file with the interstate commerce commission and to publish its schedules of rates and charges for the transportation of property, whether by itself or by itself with the aid of connecting carriers, between Tekamah, Nebraska, and Waterloo, Iowa. And admits, that the tariffs and schedule of rates in force and use by defendant in making the contract with plaintiff for the shipment of said mare and colt was in fact at the date said contract was made, on file in the office of the interstate commerce commission of the United States, but in that behalf this plaintiff shows to the court that the contract of carriage in this case was made within the State of Nebraska, and subject to the laws thereof, and in so far as the same sought to limit the liability of said defendant for the loss of said mare and colt while in transit, the same was and is contrary to law and wholly void and this plaintiff denies that it is the duty of defendant to file with the interstate commerce commission any rule or regulation in violation of law or any contract containing an unlawful limitation of its liability.

BUD R. LATTA, *Plaintiff*.
By HOPEWELL & HOPEWELL and
H. C. BROME, *His Attorneys*.

The State of Nebraska,
County of Douglas, ss:

H. C. Brome, being first duly sworn on his oath says: That he is one of the duly authorized Attorneys for plaintiff in the above entitled cause. That plaintiff is absent from Douglas County, Nebraska, and that the facts stated in the foregoing reply are true as affiant verily believes.

H. C. BROME.

Subscribed in my presence and sworn to before me this 22nd day of April, 1908.

[SEAL.] CLINTON BROME,
Notary Public.

My Commission expires March 24th, 1911.

23 Endorsed: Filed Apr. 23, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: At the April 1910 Term of said Court, and on the 16th day of April, 1910, the following proceedings were had and done in said case, as appear of record in Journal No. "8" of said Court, to-wit:

BUD R. LATTA
vs.
ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

This cause coming on for trial, plaintiff appeared by H. C. Brome, his attorney, and the defendant appeared by C. C. Wright, its attorney; also came the following named persons as Jurors to-wit:

Maurice E. Sullivan,
William M. Kieck,
Hiram Rice,
John W. Black,
Fred Trumble,
Wm. B. Jefferson,

J. E. Trumble,
Wm. H. Ellis,
Fred Dufrene,
Joseph Wisdom,
Oscar Sampson,
Oscar R. Thompson,

who were duly empanelled and sworn to try the issues joined herein, and thereupon the cause came on to be heard on the pleadings and the evidence. By agreement of Counsel, the evidence adduced on the former trial is read to the jury. And the said Jury, after hearing the testimony, the argument of counsel and the instructions of the Court, retired to their room in charge of a bailiff duly sworn, to deliberate on their Verdict. And now come said Jury into open court with their Verdict in words and figures following, to-wit:

"United States Circuit Court, District of Nebraska, Omaha Division.

No. 64. Doc. "Y."

BUD R. LATTA, Plaintiff,
against
CHICAGO, ST. PAUL, M. & O. R. R. Co., Defendant.

Verdict.

We, the Jury in the above entitled cause, find in favor of the plaintiff therein, and assess his damages at the sum of Thirty-five hundred and eighty-three Dollars ($3583.00).

Dated this 16th day of April, 1910.

W. M. KIECK, *Foreman.*"

It is therefore:

24 Considered, Ordered and Adjudged that the above named plaintiff, Bud R. Latta do have and recover of and from the defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company, the sum of Thirty-five Hundred and Eighty-three Dollars ($3583.00) and the costs of this action, and that he do have execution therefor.

Thereupon afterwards, to-wit: On the 26th day of April, 1910, Bill of Exceptions was filed in said case, which said Bill of Exceptions is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

BUD R. LATTA, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

I hereby certify that I have examined the attached bill of exceptions and that the same is correct and I have no objections to the same.

H. C. BROME,
Attorney for Plaintiff.

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

BUD R. LATTA, Plaintiff,
v.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be It Remembered, That heretofore, to-wit: at the regular 1910 term of the above entitled Court, and on the sixteenth day of April, 1910, the above entitled cause came on for trial before Honorable William H. Munger, Judge, and a Jury. And thereupon came the parties with their counsel in open court, W. M. Hopewell and H. C. Brome appearing as attorneys for plaintiff, and C. C. Wright appearing as attorney for defendant.

And thereupon the following proceedings were had, to-wit:

BUD R. LATTA, being called and sworn as a witness for plaintiff, was examined in chief by Mr. H. C. Brome, and testified as follows:

25 My name is Bud R. Latta. I live at Tekamah and am engaged in the stock business—farming business. I am the

plaintiff in this case. I was on the train of the Chicago, St. Paul, Minneapolis and Omaha Railway Company on which the car carrying the mare and colt belonging to me on May 9, 1907 was being shipped to Waterloo, Iowa, to be bred. In transit between Tekamah and Blair in Washington County, Nebraska, the car caught fire and the mare and colt were burned. This took place between the thirty-first and thirty-second mile post north of Omaha.

At the time the fire was discovered I was in the caboose. The train slacked and whistled. One of the boys jumped up in the cupola and looked out ahead and said, "There is a car afire." There were seven or eight other passengers on the caboose at the time—traveling men. The car in which the mare and colt were being conveyed, with reference to the engine was in the second car from the engine. When I was informed that there was a fire out ahead I got out and went up there as fast as I could. The car in which my mare and colt were being conveyed was on fire. When I got there, there was a man on top of the train chopping, trying to put out the fire, trying to chop it out, and throwing water on it, and the fire dropped down into the bedding. There was a fire, I suppose as large as a bushel basket or more, in the bedding, and there was a man got in, broke the seal on the car and went in and was breaking down the partition that was in the car and I immediately got up on the side of the car and as he knocked the partition down I ran around on the side of the car and from the outside I whipped the mare back. She had her head in the northwest corner, I think it was and as she went up he was going to drive her out, but he was afraid of her and ran up to the side of the wall and then came out of the car. In the meantime they had been trying to uncouple this car, and they had a little difficulty in getting it loose. They pulled up about fifty feet and stood there, I should judge about thirty seconds, and I got on the side of the car and was inside the door just going in the door and the conductor says, "Get out of that car, we are going to the siding." I said, "Wait a little bit and get this mare and colt out." They stopped there after pulling up about fifty feet about half a minute I should judge. At this time one of the train crew was in the car. He knocked the partition down. I do not know what he was, but think he was the head brakeman. There was a tub of water standing in front of the mare at that time. It was a common wash tub full. I didn't see it then—didn't look for it then—but it was there for it was there when I put it there and it was there 26 when the car burned up. At the time I reached the car, the roof was on fire and the fire had just dropped into the bedding at the northeast corner of the car. The car was headed south, and the fire was in the northeast corner, about five or six feet back from the corner, I should judge. In loading the mare and colt we put up a partition to keep her confined in one end of the car, and that was just nailed in there. The train was headed south. The partition was just in the north edge of the door. When the brakeman first reached the car he opened the west door. At the place where the car was standing when the train was first stopped and also after they had pulled up fifty feet and stopped again,

the west side of the train was just up against a bluff; I should judge seven or eight feet out to the incline where it commenced to rise up. At the time the car was first pulled forward the mare and colt were not injured. They were singed a little. The mare's mane was singed and the hair on her legs was singed a little. The colt was also singed the same way, but not to burn—not to make any permanent marks on them. I said to members of the train crew at that time that if they would get hold of the colt and pull it out, the mare would follow it. The mare was following the colt when the fire was in there. She kept her nose right on the colt and when I brushed her away she just made a break to the other end of the car and the colt followed her to the south end of the car. There was no fire in the south end of the car, there was no bedding there, and the mare was all out of the fire, and no fire there at all—there was no fire in the car opposite the door, which was open. I should judge the fire at that time was eight or nine feet north from the door. The fire in the bedding was about the size of a bushel basket. I was not up where I could see the size of the hole the fire had made in the roof of the car at that time. I saw the man up there chopping, trying to chop the fire out, but when he did hit it, he would shatter it down into the bedding more. The mare and colt were in the bedding at that time. That was about the time the partition was being torn down. The conductor in charge of the train at the time they started to pull forward from the point where they first stopped after having pulled up fifty feet, said, "Get out of there. We are going to the siding." I didn't want to take a chance of riding with the car afire. The car had started up before I left it, probably ten or fifteen feet; it started very quick. They pulled the car at that time to Highland or Tyson's Station, a mile and a fraction. There was a fire in the engine which was pulling the train. I did not look for or notice any sparks or some issuing from the stack of the engine coming from the town of Herman to this station of Tyson. I sat in the caboose talking
to a gentleman. I did notice smoke issuing from the en-
27 gine after I alighted from the caboose and started forward.
There is always smoke from the engine. I did not see any other fire around this vicinity at that time except the fire in the engine. I was there until they came back. They were gone an hour, I guess. I did not notice any other fire anywhere except some of the roof boards that they had kicked off the car were there. The car immediately in front of this car was loaded with baled hay. The car immediately behind it was loaded with horses. One of the horses in the car immediately behind this car belonged to me. The other belonged to Judge Sears. This was the second car back from the engine. The name of this mare that was burned was Lena Russell. She was thirteen years old. She was foaled in 1894. She was by Mont Russell, his number 16892; Mont Russell, by Lord Russell, his number 4677; his dam, by George Wilkes, his number 519; her dam was Lena L., by Duke of Brunswick, his number 14,256, and he by Hambletonian, 10; Lena L. was also dam of Nina Russell, 2:12¼; her second dam was Elsie, by Jay Gould, his

number 197; Jay Gould by Hambletonian 10; Elsie's dam, was Kittie Clover by Hero. She was registered in the American Trotting Register. The colt was not registered. He was subject to registry. I can give the breeding of that colt. He was by Union Medium, Junior. He had a mark of 12¾. Dam was Lena Russell, the mare that burned.

I have been engaged in the business of handling racing horses twenty years. I generally have at one time thirty to thirty-five standard bred horses. I am in the business of trading and selling thoroughbred racing horses. I am acquainted with the fair market value of a thoroughbred mare when I have a knowledge of her breeding and I am also acquainted with the mare or horse as an individual. I know the fair market value of this mare, Lena Russell, on or about May 9, 1907.

"Q. You may state that value.

Mr. Wright: That is objected to as incompetent and immaterial and no proper foundation having been laid, and not directed to the proper time and place.

The Court: At Tekamah, is that fixed, perhaps you had better locate it at Tekamah, or in that neighborhood.

Mr. Hopewell: I will withdraw the question and ask another.

Q. Do you know the fair market value of this mare, Lena Russell, on or about May 9th, 1907, at Tekamah, Nebraska?

A. I do.

Q. You may state that value.

28 Mr. Wright: That is objected to as incompetent, irrelevant and immaterial, no proper foundation having been laid, and not directed to the proper time and place.

Objection overruled.

Defendant excepts.

A. I think a fair value on her was $2500.00, very cheap mare at that."

I know the fair, reasonable market value of the colt which was by the side of the mare Lena Russell, on or about May 9, 1907, at Tekamah, Nebraska. He was worth five hundred dollars.

Cross-examination.

By Mr. C. C. Wright:

I was at Tekamah at the time the mare was loaded. I superintended the loading of the mare. She was loaded into a stock car. I saw the car at the time. In loading the mare I placed some bedding in the north end of the car—one bale of straw, and one bale of hay. The straw weighed forty pounds and the hay about sixty—regular bales—and that was spread from the portion of the car that was north of the north side of the side door. In loading I put up a partition across the sides of the car north of the two side doors. It was constructed of rough boards 1 by six inches wide fencing, securely nailed to each side of the car. The partition was about five

feet high and the cleats were nailed on to the door jamb. I think there was four boards in this partition. I am sure of it. It came to within six inches of the floor. It was not a solid partition There was about six inches between the floor and the first board, and then it was different spaces higher up, the higher it got, the wider it got. There was no board in the center of this partition running up and down to stay it. I left Tekamah with this animal and rode in the caboose all the way. I did not have a caretaker along. No one else accompanied the shipment. No one was in the car. It was sealed. It was sealed when it left Tekamah. After leaving Tekamah before the fire I got out on the platform of the caboose at Herman when we stopped there. Herman is the next station this side of Tekamah and the next one this side of that is Tyson. The car was discovered on fire between Herman and Tyson. The first notice I had was the whistling and some of the train men saying the car was on fire. I got out on the west side of the train and ran along to the car. There were twelve or more cars in the train, I should judge, before I reached the burning car. Only one trainman
was at the car when I reached there. I do not know his
29 name nor his position. I think I would recognize him if I
saw him again. I am not able to describe him.

"Q. Mr. McCloud, stand up please (A gentleman in the rear of the room stands up). I will ask you whether this man standing up here, Mr. McCloud, was the man?

A. No."

I think he was the conductor. I think I beat him to the burning car. I think he went over the train, but I wouldn't say for sure about that, because I was trying to get there myself, and I didn't see who was going. The first man I saw was the man on top trying to chop a hole. He had another fellow carrying some water. There was one man at the hole and another man getting some water, or came very shortly after I got there with some water. He was coming from the front, from the engine, with buckets of water. Afterwards there were two or three men carrying water. I did not see the fireman filling buckets at the engine and two men carrying them. When I got there, there was a fire in the bottom of the car, in the bedding and it had already burned up a place about the size of a bushel basket by the time I got there. This bedding was about four or five inches thick over the car floor. It was dry hay and straw. When I got there, the fellow on the west side had gone in the car. Not the fellow on top—the fellow on the west side. When I got there, there was two men, one man was on top, chopping a hole and one man was getting in the car, was in the car at the time I got there. Mr. McCloud was not the man that was in the car. One man was working at the top, and one man had gone through the door. I could see him working at the door when I was a distance away, and he opened the door and went in. I did not see the second man when I got to the car because he was in the car when I first got there and I was on the outside. It was a stock car. I couldn't see very well through the slats of the car. I got up to the door, got on the side and went around and whipped

or brushed the mare back. I went around on the west side. I never was on the east side. I climbed up on the west side of the car. The mare was in the northwest corner of the car and the fire was in the northeast corner of the car. The train was standing when I got there. I did not get into the car at all until after it had been moved away from the rest of the train. I was on the car. I was hanging on the side of the car, shooing the mare back into the other end of the car. At that time one man was in the car. I don't know who it was. It was not the conductor, Mr. McCloud. I don't know the brakeman's name. I didn't break down the partition. The man—I won't say he was the brakeman—broke
it down. I saw him in there beating it down with some
30 kind of a tool. The man was on the south side of the parti-
tion. I did not see any man on the north side of the partition. The boards were nailed to the north side of the door jamb. I did not see any man inside on the north side of this partition while I was there. I did not see the conductor, Mr. McCloud, in the car at all. I think it was the brakeman who broke down this partition. I think it was at the west side of the car that he broke it down. And then the mare when I shooed it, ran to the other end of the car. And this man was going to drive her out, but he got scared and she went down to the other end of the car. She went down on a trot. The man came out just as soon as the conductor says, "We are going to the siding." He stayed in there until the conductor said that. With reference to the time they uncoupled from the train, it was about the time that the train was moving up that fifty feet and uncoupled that I got the mare shooed into the south end of the car. The mare never went back into the north end of the car that I saw—she never went back. She did not run back immediately right by that door into the fire. The last I saw her she was in the south end of the car away from the fire 20 or 25 feet. I saw her after she was burned. She was then in the north end of the car. She ran back there finally. I don't know when she did that. All I know is what the conductor told me. During the time I was there, there was more than the two men I have described there. I don't know the names of the train men. I have described two brakemen—I couldn't say they were brakemen. There were two men there, two more men—that came around when the car got away. I got their names and can give them to you. The conductor went with the car, he went with the engine. He was there when it was uncoupled from the train. He and the brakeman were trying to uncouple the car when I was trying to shoo this horse into the other end. I don't know that the whole north end of the car was in a blaze at the time they uncoupled the car. The fire never touched the other car of horses. I didn't see the conductor do anything in relation to the horse except to uncouple the car. He was on the east side of the track when I heard him say, "Get out of there." I don't think he was on the west side at all. The east car door was not open. There were two fellows that came out of the engine that didn't belong there, I think. They come from some place. They was there. I don't know

whether they were trainmen or not. There was no one trying to get the mare out except this one fellow and myself. The rest just stood around there. We wasn't there very long. From the time I first got up to the car until they uncoupled the car was two or three minutes. The flame the size of a bushel basket was growing
31 right along. It didn't fill the north end of the car until after they started up. At the time they made this stop the mare had been singed a little on the mane. Her legs were singed a little. At the time they moved up fifty feet and stopped, the flame was getting into the north end and spreading like a fire will. At the time they uncoupled only the northeast corner of the car was enveloped in flame. When they started to pull up to the siding it was spreading good, getting to burn pretty well. There was quite a lot of fire but it was not getting bad. It had been tramped around on the bedding, but not over the whole north end. The northwest corner was not ablaze and on fire. When I shooed the mare from the northwest corner there was no fire between her and the partition. There was none on the west side until I turned her around when the car pulled up. When the car pulled up there was not any fire on the west side of the car but that I could go right along with my hands ahold of the slats. I was in the door of the car when they started up going to the siding. After they got started up the whole space across the car from east to west was ablaze. I don't think it was at the time they started. No sir. At the place where they pulled up about fifty feet and stopped about thirty seconds they came to an entire stop. The conductor was on the east side of the car and I was on the door on the west side of the car. No one else was in the car with me then. I don't know what had become of the brakeman who was in there before. The place where this was situated was through a cut, there was a bank on the west side. The edge of the bank was about eight or nine feet from the edge of the car, it is an incline coming down from the hill. It had been graded out and dug out, down below the level of the ties, up to a place about seven or eight feet away from where the car would extend. I don't know as it was all dug out alongside of the track so that it was level to the west of the track immediately, and so that it was lower than the track was. I guess there is a little ditch along there. So the only place at which they could get out, was seven or eight feet west of the car, without jumping down the entire distance. I don't know how many feet the height of the car door was from the ground; it was just an ordinary car. This was about the same condition as the place where I first saw the car before they moved. The time they first discovered the car on fire, until the time they started for the siding would be somewhere about three minutes and a half. There was a tub full of water in there. I know because there was water in it after the car burned up. I don't know that when they took the car down there, they threw water all over it and put it out. I wasn't there. I know I put water into the tub at Tekamah and that there was water
32 in it after the fire was out. I don't know that they drenched the car to put the fire out. I know the fire was put out and

the mare was lying right there on top of the car. I think they pulled the top right off when it was burned and charred, they pulled it right off and it was lying to one side. The water that was in the tub the next morning might have been that which they threw in there when they put the fire out. The tub was in the east side of the car, next to the east door, inside where the mare was. It wasn't fastened down. It was a loose tub in there. There was no fire around that tub when I was in the car. The signatures at the bottom of defendant's Exhibits 1 and 2 "B. R. Latta" are my signatures and these are the papers I signed at the time I shipped these horses. I have been engaged in shipping for a number of years along the line of the M. & O. For twenty years. I have myself during that time attended to the business. On the day that the accident to these horses happened I was in good health. My eyesight was good. There were two men on the engine that did not belong there, that I thought came from there. One gave me his name as G. E. Gardner, Winona, Minnesota, 260 Jackson Street. I do not know where he is now. He said he was employed by the Western Union Telegraph Company as a lineman at that time. The name of the other was Harry Wells. He said he also was in the employ of the Western Union Telegraph Company in the line repair department. I do not know where Harry Wells is now. I learned the names of some other people present there who saw it. I know Mr. I. A. Smith, who was at that time with the Carpenter Paper Company was there. I know he was on the train, I don't think he was up to the car—the car had gone before he got there. I don't think he was up to the burning car. He may have been there. A man by the name of De Hart, Norfolk, Nebraska, was there. I don't know where he is now. A man was there by the name of C. F. Bellman, Omaha. I don't know whether he was up there to see the fire. Another man was John Operst and he lives at Herman. There was another man by the name of Conklin who was there—that is, he was on the train. I couldn't say whether he was up to the car. He was standing to one side. He was not assisting me in the moving of the stuff. He was with me when we started leaving the caboose and I saw him after I got there standing in the corner of the car on the west side of the track.

Mr. Wright: As a part of the cross-examination of this witness I offer in evidence the paper marked defendant's Exhibit 1, being the Livestock contract entered into between the plaintiff Latta and the defendant Chicago, St. Paul, Minneapolis and
33 Omaha Railway Company for the transportation of the mare and colt in controversy in this case.

Mr. Brome: That is objected to as incompetent, irrelevant and immaterial and not tending to show any fact pertinent or relevant to the issues in this case, and for the reason that the Live Stock Contract does not and cannot contain any provisions limiting the nature of the defendant's liability, or the amount of such liability in any event in this case.

Objection overruled. Defendant's Exhibit No. 1 is received in evidence. To all of which the plaintiff excepts.

Said Exhibit No. 1 being in the words and figures following, to-wit:

DEFT'S EXHIBIT 1, C. W. P.

Read This Contract.

Chicago. St. Paul, Minneapolis & Omaha Railway Co.

It is the desire of this Company that this contract shall be executed on all shipments of Live Stock in carload lots or less. In case shipper declines to execute this contract, the valuation of the Live Stock, as stated by the shipper, shall be stated on the shipping bill, and in such case the rates will be 10 per cent higher than they would be under this contract if he executed it. If the shipper declines either to state the value of the Live Stock on the shipping bill or to execute this contract, the charges in that case will be 10 per cent higher than the rates provided in this contract when the owner or shipper declares the value of the stock to be over $800 per head or declines to declare its value.

Different Kinds Of Live Stock must not be loaded together in the same car (except as provided for in the classification or by special instruction.

For Rules Covering The Passage Of Men With Live Stock See Issues Of General Freight Department.

Persons In Charge Of Live Stock Are Prohibited From Getting On Or Off Cars Or Walking Over Them While They Are Moving.

No Passes Will Be Given By Any Agent where Live Stock is loaded and shipped. He will enter on the back of this contract the names of the owners of Bona Fide employés who, as herein provided, are entitled to ride free, and only such as are in actual
34 charge of and accompanying the stock. Such entry will be authority of conductor to pass them with stock. He will refuse to enter any others, without regard to the passes permitted to the number of cars. No persons will be allowed to ride in the car with the stock, but must ride in the caboose attached to the train. No free passage upon any train of this Company will be given on account of stock shipments except as above specified.

A. W. TRENHOLM,
General Manager.

E. B. OBER,
General Freight Agent.

Nos. of Way-Bills.	Initials And Nos. of Cars.	No. and Kind of Animals in each Car. Shipper's Count.
C. G. W.	5721	1 Horse 1 Colt 7501½ S. L. & C.

Live Stock Contract.

TEKAMAH STATION,
5/9, 1907.

This Agreement, Entered into on the day above stated, between the Chicago, St. Paul, Minneapolis & Omaha Railway Company and B. R. Latta,

Witnesseth, That the said Railway Company has this day received from the said B. R. Latta one horse to be transported from Tekamah, Nebr., station to Waterloo, Ia. Station, consigned to Joe McLaughlin at D. O. at the rate of trf. per cwt, upon the terms and conditions following, that is to say:

The property described herein is to be transported by the Chicago, St. Paul, Minneapolis & Omaha Railway Company to the destination named hereon, if on the rails of said Chicago, St. Paul, Minneapolis & Omaha Railway. If said destination is not on the line of said Company, then to point of connection with Railway or other Transportation Line necessary to complete delivery to destination shown, and it is expressly stipulated and agreed that the above property is transported on the conditions endorsed hereon, which form part of this contract and of the consideration for carrying same, and not otherwise. And the Company is not to be held liable for the loss of said property, or for any damage or injury to same, or for any delay, thereof, by any carrier, carmen or freightmen, after the same has been unloaded at destination shown hereon if said destination is on the rails of said Chicago, St. Paul, Minneapolis & Omaha Railway, or after delivery to any Railway or other Transportation Company necessary to complete delivery to destination shown. But in case of loss, damage or delay to said shipment, or any part thereof, the carrier upon whose line same shall occur shall be held to be liable to the same extent only as this Company would in case of loss on its line.

The said Railway Company shall not be liable for the loss or death of, or any injuries received by, any of such stock, unless the same is immediately caused by the willful misconduct of the actual negligence of the said Company, or its agents, servants or employés.

The rates provided in the tariffs of this company are based upon the following value of animals named to-wit:

One hundred dollars per head on each horse or pony (gelding, mare or stallion), mule or jack.

Fifty dollars per head on each ox or bull.

Thirty dollars per head on each cow.

Ten dollars per head on each calf or hog.

Three dollars per head on each sheep or goat.

And if this shipment is moved at the tariff rate it is agreed that the value of the animals shipped does not exceed, of their kind, per head the above named valuation.

If the shipper declares a value in excess of the above valuation, and this shipment is moved at a rate based thereon, it is agreed that the value of the animals shipped does not exceed such declared valuation, which is as follows:

Each hore or pony (gelding, mare or stallion), mule or jack, per head			$100.00
Each ox or bull, per head	$..	Each cow, per head	$..
Each calf or hog, per head	$..	Each sheep or goat, per head	$..

The shipment covered by this contract is accepted and forwarded subject to the agreed valuation, and the rate of freight is based on the condition that the Railway Company assumes liability only to the extent of such agreed valuation.

When the declared value exceeds the valuation on which the tariff rate is charged, an addition of 25 per cent will be made to such rate
for each 00 per cent or fraction thereof, additional declared
36 value per head up to $800.00 per head. When the owner or
shipper declares the value to be greater than $800.00 per
head, or declines to declare the value of the stock, charges will be based upon 200 per cent of the rate provided above, based on value of $800.00.

The said shipper agrees to load, unload and reload all said stock at his own expense and risk, and to feed, water and attend the same at his own expense and risk while it is in the stock yards of the said Company, awaiting shipment, and while on the cars, or at feeding or transfer points, or where the same may be unloaded for any purpose.

The said shipper himself assumes the duty of properly and securely placing all the said stock in the cars, and of keeping such cars securely locked and fastened, so as to prevent escape by such stock therefrom.

In case the said Railway Company shall furnish any laborer or laborers to assist in loading or unloading said stock to any point, no additional charge will be made therefor, and such laborer or laborers shall while so engaged be deemed as exclusively the employés of the said shipper; and the said Company shall not be liable for anything done, or omitted to be done, by such laborer or laborers, while so engaged.

The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss of or injury to any of said stock, he will give notice in writing or by telegraph of his claim therefor to some officer of said Railway Company or its nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock.

The said shipper hereby accepts for transportation and acknowledges and admits the cars furnished by said Railway Company to be sufficient and suitable cars in every respect for the shipment of said stock, and hereby assumes all risk of injury which the animals, or either of them, may receive in consequence of any of them being wild, unruly or weak, or maiming each other or themselves, or in consequence of heat or suffocation, or other ill effects of being crowded in the cars, or injury by the burning of straw, hay or other material placed in the car or used for feeding the stock or otherwise, from all risk of damage which may be sustained by reason of any delay in such transportation, and all risk of escape of any portion of said stock, or loss or damage from any other cause or thing, not resulting from the willful negligence of the said Railway Company.

37 The car wherein the said stock is to be carried having been tendered to the said shipper by the said Railway Company for that purpose, the said shipper hereby agrees that such car .... fit and proper for the purposes of such transportation.

The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of this Company, to whom the said property may come for the purpose of transportation to destination.

The said shipper shall not be entitled to free transportation for himself or his employés by virtue of this contract, except in accordance with the rules issued by General Freight Department, all of which rules and regulations are made part of this contract and are agreed to by shipper.

C. H. HAMBLIN, Jr., *Agent.*
B. R. LATTA, *Shipper.*

Note.—When shipper accompanies shipments, contract will be issued in duplicate, original being sent to Assistant Claim Agent, and duplicate handed shipper. When shipper does not accompany shipments original contract alone will be issued, same being sent to Assistant Claim Agent.

*Agents must fill out this contract very carefully and complete.

Endorsed on back as follows:

Chicago, St. Paul, Minneapolis & Omaha Railway Co.

Stock Contract.

Nos. of Cars............................

Men actually in charge of and accompanying within named stock are required to write their own names in ink or in indelible pencil here.

....

Men in charge have written their own names above.

........................Agent.
........................Station.

38 NOTE.—Agents will permit only the signatures of owners or bona fide employés, who accompany the stock, to be entered on back of contract, running pen through remaining lines.

Men actually in charge of Live Stock will be required to ride in the Caboose Car attached to the train, and are prohibited from getting on or off cars or walking over them while they are moving.

Note to Conductors.

Make cancellations in space provided, as per directions given concerning the cancellation of tickets.

No stop-off checks will be given on this contract.

Conductors must take up this Contract when used for return passage from point where Drover's Return Passes are not issued.

To be signed in Conductor's presence for return passage.

....

Signatures must correspond with those made at forwarding station.

A. W. TRENHOLM,
Gen'l Manager.

E. B. OBER,
Gen'l Freight Ag't, St. Paul, Minn.

Cancel Here

....

In order to have benefit of return passage as provided in circulars referred to above, contracts must be presented for return passage when issued, on shipments of Horses or Mules within 30 days, and other stock within 3 days after stock has arrived at destination. Return passage to commence within 24 hours after contract is stamped and signed by Receiving Agent.

....

(This blank will be filled in by agents for the return passage of men in charge of Live Stock at stations where Drover's Return Tickets are not furnished).

39 Good For Return Passage of

....

From .... To..............................

If used on or before..

....

Agent at....................................

Stamp.

Cancel Here.

This contract is not good for Return passage from Minneapolis, St. Paul, Duluth, Superior, Sioux City or Omaha.

	Description of Man in Charge.
Agent must in all cases punch description before allowing contract to leave his office.	**Size** Slim * Medium * Stout * **Height** Tall * Medium * Short * **Hair** Light * Gray * Dark * Red * **Beard** Mustache * Chin * Side * Full Beard * None. *

Agent must in all cases punch description before allowing contract to leave his office.	Description of Man in Charge.	
	Size	
	Slim	*
	Medium	*
	Stout	*
	Height	
	Tall	*
	Medium	*
	Short	*
	Hair	
	Light	*
	Gray	*
	Dark	*
	Red	*
	Beard	
	Mustache	*
	Chin	*
	Side	*
	Full Beard	*
	None.	*

Mr. WRIGHT: As a part of the cross-examination of this witness, I offer in evidence the paper marked defendant's Exhibit 2, being the "shipping order," signed by B. R. Latta as shipper, covering the animals in controversy in this case being a shipping order on the form of the Chicago, St. Paul, Minneapolis and Omaha Railway Company.

Mr. BROME: I object to that as incompetent, irrelevant and immaterial, and not tending to show any fact pertinent or relevant to the issues in this case.

Objection overruled.

Defendant's Exhibit No. 2 is received in evidence, to all of which the plaintiff excepts.

Said Exhibit 2 being in the words and figures following, to-wit:

41 DEF'T'S EXHIBIT 2, C. W. P.

See Contract on Back of this Shipping Order.

Chicago, St. Paul, Minneapolis & Omaha Railway Co.

Shipping Order.

(To Be Retained by Agent.)

Car No. CGW. No. —.

Initials of Car 5721.

TEKAMAH STATION, 5/9, 1907.

(The shipper may elect to accept the conditions printed on the back hereof and as contained in the Bill of Lading of which this Shipping Order is a part, or may, as provided below, require the carriage of property at "Carrier's Risk").

Receive, carry and deliver the articles described below, in accordance with the Tariff and Classification in effect at the date of this order and subject to the conditions of the Bill of Lading of which this Shipping Order is a part. (For Carrier's Liability see note below.)

. . . .

Consignee, Destination, Marks And Routing	Articles	Weight	
Joe McLaughlin Waterloo, Iowa.	1 Horse 1 Colt under 1 year.	2000 750	Subject to correction.
	ORel to Cont. val. S. L. & C. Paid to Apply	$24.38	

Charges advanced. B. R. Latta, Shipper.

(In red ink across the face:) Grain subject to Elevator Delivery.

. . . .

If the Shipper elects not to accept the said tariff rates and conditions, he should so notify the Agent of the receiving carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to the conditions of the Bill of Lading of which this order is a part, in order to secure the reduced rates thereon. Property carried not subject to the conditions of the Bill of Lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States, and of the several states in so far as

they apply. Property thus carried will be charged at the
42 higher rating provided in Current Tariffs and Classifications
to apply when not shipped subject to the conditions of the Bill of Lading of which this is a part, and the cost of marine insurance will be added over any part of the route that may be by water.

The Bill of Lading for the property covered by this Shipping Order is Not Negotiable. If the word "Order" is written on the Bill of Lading Immediately before or after the name of the party to whose order the property is consigned, the surrender of the Bill of Lading, properly endorsed, shall be required before the delivery of the property at destination.

C-15.

Conditions and Rules Forming Part of the Within Contract.

1. The property described herein is to be transported by the Chicago, St. Paul, Minneapolis & Omaha Railway Company to the destination named hereon, if on the rails of said Chicago, St. Paul, Minneapolis & Omaha Railway. If said destination is not on the line of said Company, then to point of connection with Railway or other Transportation Line necessary to complete delivery to destination shown, and it is expressly stipulated and agreed that the above property is transported on the conditions endorsed hereon, which form part of this contract and of the consideration for carrying same, and not otherwise.

And the Company is not to be held liable for the loss of said property, or for any damage or injury to same, or for any delay thereof, by any carrier, carmen or freightmen, after the same has been unloaded at destination shown hereon if said destination is on the rails of said Chicago, St. Paul, Minneapolis & Omaha Railway, or after delivery to any Railway or other Transportation Company necessary to complete delivery to destination shown. But in case of loss, damage or delay to said shipment, or any part thereof, the carrier upon whose line same shall occur shall be held to be liable to the same extent only as this Company would in case of loss on its line.

2. Freight stored at destination at request of or for convenience of owner will be charged for at the rates specified in the published schedules of the corporation.

3. The delivering Carrier, whether for transportation or switching, may make such reasonable charges for the use of any car, or of its track (and add such charges to all other charges hereunder), as shall be provided for by the customs, rules and regulations of such delivering carrier, and such charges shall be a lien on the property transported hereunder.

43 4. The corporation will not receive or carry any Bank Bills, Drafts, Notes, Deeds, Contracts, evidence of property or other writings, or be responsible for their loss or injury.

5. No conductor or other Agent of the Corporation is authorized

to take charge of Bank Notes, Money, or other valuable papers or things, for or on account of the Company, or to receive any perquisites or reward, for himself or for the Company, on or for such articles.

6. Gunpowder and combustible articles of any description will be taken only on special terms and rates. If found secreted among other goods they will be taken from the cars and stored. In case of damage in consequence of the same being so secreted, the shipper or consignor will be held liable.

7. Articles will not be received for transportation unless properly packed in suitable Casks, Boxes, Bales or Packages; and each must be well and clearly marked with the name of the Consignee and of the Station where they are to be delivered; otherwise they will not be receipted for, in which case no damage for loss or miscarriage, will be paid. The Company will in no case be responsible for loss, injury, or damage which might have been avoided by skillful and more careful and sufficient packing, or which occurs without the negligence or fault of the Company or its agents. All property is subject to cooperage when necessary.

8. This Corporation will not be responsible for damage occasioned by delays from storms, accidents or unavoidable causes; or by decay or injury to fruit, fish, dressed hogs, dressed poultry or other perishable property; or from injury to property produced by frost, heat, or the elements; and the Corporation will not be liable for the non-delivery of such property in any certain time, nor in time for any particular market.

9. The Corporation will not undertake or agree to carry property by any particular train, nor in time for any particular market nor are they to be responsible for loss or damage arising from any delay or stoppage, however occasioned; but they will forward the same with as reasonable dispatch as the general business of the Corporation will permit.

10. The Corporation will only be liable as warehousemen, after the property has been placed in their freight depot. But for loss or damage of property by fire, while in their freight depot or storehouse, the Company will not be liable.

11. The Corporation will not be responsible for any loss or injury happening or occasioned by unruly or vicious horses,
44 cattle, swine or sheep, nor for accidents to the same in loading, carrying or unloading the same; nor for any damages, however caused, to live stock or animals of any description, transported or carried upon their railway, or in their cars or vehicles.

12. The Corporation will not be responsible for loss or damage to any article by fire or otherwise, the bulk of which renders it necessary to be forwarded in open cars.

13. Goods or property consigned to any place off the Company's line of road, or to any point or place beyond its termini, will be sent forward with as reasonable dispatch as the general business of the Corporation, at its warehouse within mentioned, will admit by a carrier or freightman, when there are such known to the station agent at said warehouse, willing to receive the same unconditionally

for transportation, the Company acting for the purpose of delivery to such carrier or freightman, as the agents of the consignor or consignee, and not as carriers. The Company will not be liable or responsible for any loss, damage or injury to property after the same shall have arrived at the within mentioned Company's station for delivery to the owner, consignee or to the connecting carriers or freightmen for transportation.

14. No station agent or clerk has authority to alter or vary — of these Rules and Conditions.

15. In consideration of the acceptance and transportation of freight to stations at which there is no railway agent, which is done solely for accommodation of the shipper or consignee, it is agreed that freight so carried may be put off on the arrival of trains, and shipper assumes all risk of loss or damage to the goods after being so unloaded.

No. 16. Owner's Risk.—All property received and shipped O. R. (meaning owner's risk) is shipped subject to the conditions printed on the back of this receipt, and to all conditions, specified in general tariffs and classifications, and at a reduced rate by reason of the acceptance of such conditions. If the shipper does not accept such conditions he must give notice to the agent at the time of signing shipping bill, and by so doing may have goods forwarded subject only to conditions imposed by law, in which case additional charges will be made, as provided in general tariffs and classifications.

Redirect examination.

By Mr. Hopewell:

Q. You may describe the condition of the ground with
45 regard to its being hard or soft, wet or dry, immediately to
the west of the car door where the car stood at the time
of the fire?

Mr. Wright: That is objected to as not proper redirect examination.

The Court: At the present time I think it is immaterial.

To which ruling of the court plaintiff at the time excepted.

It was stipulated in open Court that Frank Strohan of Wayne, Neb., John Kay of Neligh and N. G. Rowen of Fremont, if present, would each testify that they are in the business of handling race horses and know the fair market value of the horses in question at Tekamah May 9, 1907, and that the mare was worth $2500.00 and the colt was worth $500.00, which stipulation was received in lieu of the testimony of said witnesses, and thereupon the plaintiff rested.

The defendant offered in evidence so much of Western Classification No. 42 as relates to the rate on live stock. The following question and admission was asked and made:

Mr. Wright: Are you willing to admit that this "Western Classification No. 42," which has been marked defendant's exhibit 3, was on file with the Interstate Commerce Commission at the time of the movement of the stock in question, and that it was posted in the station at Tekamah, and was the tariff then in force and governing the movements of live stock on the defendant railroad.

Mr. Brome: I am willing to admit that the tariffs and schedules of rates in force and in use by defendant in making the contract with the plaintiff for the shipment of said mare and colt, was in fact, at the date said contract was made, not only filed in the office of the Interstate Commerce Commission, but published as required by law, and I admit that Exhibit 3 is the tariff referred to.

Mr. Wright: Now I offer from this Defendant's Exhibit 3," commencing on page 73 with the figures "44 Live Stock," the balance of that page and down through and including the number "12" in the second column of page 74, reading "Stallions or Jacks, 3,000 lbs. each, first class."

Mr. Brome: That is objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Plaintiff excepts.

46 Said Exhibit "3" being in the words and figures following:

Exhibit "3."

"Live Stock. C. L.

Ratings given below are based upon values declared by shippers, not exceeding the following, under Contract:

Each Horse or Pony (gelding, mare or stallion, Mule or Jack)	$100.00
Each Colt (under one Year)	50.00
Each Ox, Bull or Steer	50.00
Each cow	30.00
Each calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00

Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 lbs. or car for each 100 per cent, or fraction thereof, of additional declared value per head; animals exceeding in value $800 per head, or when no value is given, will be taken only by special arrangement.

1. Live Stock, in carloads (limited liability for) See Tariff each animal under contract at values stated above.)

2. Live Stock, L. C. L. (limited liability under contract, at values stated above) the following estimated weights (Exception to Rule 1) viz:

3. One Horse (gelding or mare) or Pony, Mule or Domestic Horned Animal (except bulls) N. O. S., 2,000 lbs.; two animals 3,500 lbs., three 5,000 lbs., each additional animal 1,000 lbs. . . 1

4. Bulls, 2,000 lbs. each 1

5. Burros, 750 lbs. each 1½

6. Calves (under one year) in crates, 500 lbs. each 1½

7. Calves not in crates will be rated the same as adult animals.

CHARTS

TOO

LARGE

FOR

FILMING

8. Colts under one year 750 lbs. each	1½
9. Goats in crates, estimated wt. 200 lbs. each	1½
10. Hogs in crates, actual wt.	1½
11. Sheep in crts., 200 lbs. each	1½
12. Stallions or Jacks, 3,000 lbs. each	1"

Thereupon Lyman Sholes was called and sworn as a witness on the part of the defendant. Being examined in chief by Mr. Carl C. Wright, he testified as follows:

47–48 My name is Lyman Sholes. I am Division Freight Agent of the Defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company at Omaha, and was such Division Freight Agent in May, 1907.

Q. Now, examine the paper which I hand you, marked defendant's Exhibit 4, being Chicago, St. Paul, Minneapolis & Omaha Railway Company Waybill for time freight," and you may state whether or not the rate there charged on these horses was the rate based upon the declared valuation of $100 each?

A. Yes, sir.

Q. That waybill covers what?

A. One horse, weight 2,000 pounds, and one colt, under one year old, weight 750 pounds.

Mr. Wright: I now offer in evidence exhibit 4, being the waybill above referred to.

Mr. Brome: That is objected to as incompetent, irrelevant and immaterial, and as having no relation to the issues in this case.

Objection overruled.

Plaintiff excepts.

Exhibit 4 is received in evidence, being in the words and figures following, to-wit:

(Here follows waybill marked pages 49-50.)

51 Thereupon both sides rested and the court instructed the jury as follows:

The only matter for the jury to consider is the value of the animals described in plaintiff's petition. You will therefore find for the plaintiff and fix the amount of his recovery at such sum as you find the animals in question were worth on May 9, 1907, with interest thereon *of* 7% per annum from said date.

To which the defendant at the time excepted and particularly to that portion of the instruction which directed the jury to find for plaintiff, and to that portion which fixed the amount of recovery at the value of the animals.

Now on this 26th day of April, 1910, comes the defendant in the above entitled cause and presents to the Court the foregoing Bill of Exceptions, and prays that the same may be allowed and ordered to be made a part of the record in said cause. And it appearing that the regular April 1910 term of the court, being the term at which said cause was tried and the verdict of the jury returned herein, is still open and has not adjourned sine die, that this bill of exceptions has been submitted to counsel for plaintiff and an opportunity to offer or suggest amendments thereto afforded, and that the above and foregoing bill of exceptions is in all respects correct.

Now, therefore, I, William H. Munger, the Judge before whom said cause was tried in said court, do hereby certify that the above and foregoing Bill of Exceptions contains all the evidence offered or given upon the trial of said cause, together with the rulings of the Court respecting the reception and rejection of testimony during said trial, the instructions of the Court both given and refused with the exceptions of the parties thereto, and all rulings of every nature and kind whatsoever made during the progress of said trial, and upon application of the defendant this Bill of Exceptions is allowed by me and ordered to be made a part of the record in said cause.

Dated 26th day of April, 1910.

W. H. MUNGER, *Judge.*

Endorsed: Filed Apr. 26, 1910. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 2nd day of June, 1910, Assignment of Errors was filed in said case, which said Assignment of Errors is in words and figures following, to-wit:

52 In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

BUD R. LATTA, Plaintiff,
v.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendants.

Assignment of Errors.

Comes now the defendant in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause, and said defendant says that there is error in said record and proceeding in that behalf, to-wit:

1. That the court erred in sustaining the motion of the plaintiff made at the close of the evidence to instruct the jury to return a verdict against the defendant and in favor of the plaintiff; to which ruling of the court the defendant at the time excepted.

2. The court erred in instructing the jury to return a verdict for the plaintiff; to which ruling the defendant at the time duly excepted.

3. The court erred in instructing the jury to return a verdict for the plaintiff for the full value of the animals in question, with the interest thereon; to which instruction at the time the defendant duly excepted.

4. The court erred in rendering judgment for the plaintiff in excess of the sum of $200 and interest, upon the verdict of the jury, said judgment being contrary to law and not sustained by the pleadings and evidence in said cause.

5. The court erred in its holding and instruction that the plaintiff was not limited by his conduct in said case and representations he had made as to the value of the animals in question, to the amount of the declared value, to-wit: $200 with interest thereon.

Wherefore plaintiff prays that the judgment of said court may be reversed and that such directions may be given that the plaintiff may recover only the amount of the declared value of the animals in question, to-wit: the sum of $200 and costs of action, to which amount only he is entitled under the law and evidence, and that the defendant may be restored to all things that it has lost by reason of the aforesaid erroneous rulings of said court.

B. T. WHITE &
C. C. WRIGHT,
Attorneys for Defendant and Plaintiff in Error.

53 Endorsed: Filed June 2, 1910. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 2nd day of June, 1910, Petition for Writ of Error was filed in said case, which said Petition for Writ of Error is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

BUD R. LATTA, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

The Chicago, St. Paul, Minneapolis and Omaha Railway Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered herein on the 16th day of April, 1910, now comes by B. T. White and C. C. Wright, its attorneys, and petitions said court for an order allowing said plaintiff to prosecute a Writ of Error to the Honorable United States Circuit Court of Appeals for the Eighth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish on said Writ of Error; and your petitioner will ever pray.

B. T. WHITE &
C. C. WRIGHT,
Attorneys for Defendant and Plaintiff in Error.

Endorsed: Filed Jun- 2, 1910. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: At the April 1910 Term of said Court and on the 2nd day of June, 1910, the following Order Allowing Writ of Error was signed and filed in said case and duly entered of record in Journal No. "8" of said Court, to-wit:

Bud R. Latta, Plaintiff,
v.
Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Defendant.

Order Allowing Writ of Error.

Upon application of C. C. Wright, attorney for the defendant, and upon filing a petition for a writ of error and assignments of
54 error by the Chicago, St. Paul, Minneapolis and Omaha Railway Company, defendant in the above action, it is

Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit, the judgment heretofore entered herein, and the amount of bond on said Writ of Error be and hereby is fixed at Four Thousand Dollars.

W. H. MUNGER, *Judge.*

Endorsed: Filed Jun- 2, 1910. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 2nd day of June, 1910, Writ of Error was allowed in said case, and a Citation duly signed and returned and filed on the 3rd day of June, 1910, with acceptance of service endorsed thereon, the following of which are the originals:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Circuit Court of the United States for the District of Nebraska, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the April Term, 1910, thereof, between Bud R. Latta and The Chicago, St. Paul, Minneapolis & Omaha Railway Company a manifest error has happened, to the great damage of the said The Chicago, St. Paul, Minneapolis & Omaha Railway Company as by its complaint appears,

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 1st day of August, 1910, to the end that the record and proceedings aforesaid be inspected. The United States Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

55 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of June in the year of our Lord, One Thousand Nine Hundred and ten.

Issued at office in the City of Omaha, Nebraska, with the seal of the Circuit Court of the United States for the District of Nebraska, dated as aforesaid.

[Seal U. S. Circuit Court, District of Nebraska, Omaha Division.]

GEO. H. THUMMEL,
Clerk Circuit Court United States,
District of Nebraska.

Allowed by
WM. H MUNGER, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of said Circuit Court, at office in the City of Omaha, this 8th day of June, A. D., 1910.

[Seal U. S. Circuit Court, District of Nebraska, Omaha Division.]

GEO. H. THUMMEL,
Clerk of said Court.

No. 64 Y. United States Circuit Court, District of Nebraska. Bud R. Latta vs. C., St. P., M. & O. Ry. Co. Writ of Error to the Circuit Court of the United States for the District of Nebraska. Filed Jun- 2, A. D. 1910. Geo. H. Thummel, Clerk.

Citation.

U. S. Circuit Court of Appeals.

(Error.)

The United States of America to Bud R. Latta, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the 56 Clerk's office of the Circuit Court of the United States for the District of Nebraska, wherein Chicago, St. Paul, Minneapolis and Omaha Railway Company is Plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, this 2nd day of June in the year of our Lord one thousand nine hundred and ten.

W. H. MUNGER,
United States District Judge
for the District of Nebraska.

Service of within Citation accepted this 3rd day of June, 1910.

H. C. BROME,
Attorney for Defendant in Error.

64 Y. No. —. Doc. —. United States Circuit Court, District of Nebraska. —— —— vs. —— ——. Citation. Filed Jun- 3, A. D. 1910. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 3rd day of June, 1910, Bond was filed in said case, which said Bond is in words and figures following, to-wit:

Bond.

U. S. Circuit Court of Appeals.

Know all men by these presents:

That we, Chicago, St. Paul, Minneapolis & Omaha Railway Company, as principal and W. H. Bucholz, as surety are held and firmly bound unto Bud R. Latta in the full and just sum of Four Thousand ($4000.00) Dollars to be paid to the said Bud R. Latta — heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 3rd day of June in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at the April term A. D. 1910 of the Circuit Court of the United States for the District of Nebraska, in a suit depending in said Court between Bud R. Latta plaintiff and Chicago, St. Paul, Minneapolis & Omaha Railway Company defendant judgment was
rendered against the said Chicago, St. Paul, Minneapolis &
57 Omaha Railway Company and the said Chicago, St. Paul,
Minneapolis & Omaha Railway Company has obtained writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Bud R. Latta citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above Obligation is Such, That if the said Chicago, St. Paul, Minneapolis and Omaha Railway Company shall prosecute said error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. COMPANY,
[SEAL.] By B. T. WHITE, *Its Att'y.*
[SEAL.] W. H. BUCHOLZ.

Sealed and Delivered in Presence of
C. C. WRIGHT.

Approved by
W. H. MUNGER, *Judge.*

Endorsed: Filed June 3, 1910. Geo. H. Thummel, Clerk.

Thereupon afterwards to-wit: On the 8th day of June, 1910, Præcipe for Transcript was filed in said case, which said Præcipe is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

No. 64. Doc. "Y."

BUD R. LATTA, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

Præcipe for Transcript.

To the Clerk of said Court:

Please make Transcript in the above entitled cause for the United States Circuit Court of Appeals and include therein the following:

1. Second Amended Petition.
2. Answer to 2nd Amended Petition.
3. Reply.
4. Order, Trial, judgment and verdict. 58
5. Bill of Exceptions.
6. Assignment of Errors.
7. Petition for Writ of Error.
8. Order Allowing Writ of Error.
9. Writ of Error.
10. Citation.
11. Bond.
12. Praecipe for Transcript.
13. Certificate of Clerk.

Dated this 8th day of June A. D. 1910.

B. T. WHITE & C. C. WRIGHT,
Attorney for Defendant.

Endorsed: Filed Jun. 8, 1910. Geo. H. Thummel, Clerk.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska hereby certify that pursuant to the foregoing Writ of Error and in obedience thereto, and in compliance with the Praecipe, a copy of which is found on page 78 hereof, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court, as mentioned in said Praecipe and as indicated in the foregoing index, in the case of Bud R. Latta, vs. The Chicago, St. Paul, Minneapolis and Omaha Railway Company, No. 64 Docket "Y," and that copies of the Writ of Error and Citation, duly certified have been lodged and remain in my said office as such Clerk.

Witness my hand and the seal of said Court, at Omaha in said District, this 8th day of June, A. D. 1910.

[Seal U. S. Circuit Court District of Nebraska Omaha Division.]

GEO. H. THUMMEL, *Clerk.*

Filed Jul. 15, 1910. John D. Jordan, Clerk.

59 (*Clerk's Certificate to Printed Record.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of Chicago, St. Paul, Minneapolis and Omaha Railway Company, Plaintiff in Error, vs. Bud R. Latta, No. 3444, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in said Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighteenth day of January, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.

60 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1910, of said Court, before the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the fifteenth day of July, A. D. 1910, a transcript of record pursuant to a writ of error directed to the Circuit Court of the United States for the District of Nebraska was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Chicago, St. Paul, Minneapolis and Omaha Railway Company is Plaintiff in Error, and Bud R. Latta is Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 3444.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

61 (*Stipulation to Amend Transcript of Record.*)

On the fourth day of January, A. D. 1911, a stipulation to amend the transcript of record was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3444.

Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Plaintiff in Error,
v.
Bud R. Latta, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action, through their respective attorneys, that the transcript hereto attached, being a true and correct copy certified by the Clerk of the United States Circuit Court for the District of Nebraska, Omaha, Division, of the transcript of removal from the District Court of Burt County, Nebraska, in this action, may be filed with the Clerk of this court as a part of the record in this action, and maf be considered by the court as a part of the record in this action the same in all respects as if said transcript hereto attached had been embodied in and made a part of the printed record heretofore filed in this action with the Clerk of said court.

Dated this 26th day of December, A. D., 1910.

CHICAGO, ST. PAUL, MINNEAPOLIS AND
OMAHA RAILWAY COMPANY,
By B. T. WHITE &
C. C. WRIGHT,
Its Attorneys.
BUD R. LATTA,
By W. M. HOPEWELL,
H. C. BROME,
His Attorneys.

62 (Endorsed:) No. 3444. Chicago, St. Paul, Minneapolis and Omaha Ry. Co., Pl'ff in Error, vs. Bud R. Latta. Stipulation to amend transcript of record. Filed Jan. 4, 1911, John D. Jordan, Clerk.

Which Supplemental Transcript, referred to in the foregoing stipulation, is in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

No. 64. Docket "Y."

BUD R. LATTA, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY Company, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Wisconsin and Doing Business in the State of Nebraska, Defendant.

Be It Remembered, That on the 23rd day of January, 1908, Transcript of Proceedings in the District of Burt County, Nebraska, was filed in the Clerk's office of said Circuit Court, which said Transcript is in words and figures following, to-wit:—

Pleas before the District Court of the Fourth Judicial District of Nebraska, in and for the County of Burt at a term thereof begun and holden in the City of Tekamah in said County and State, on the 30th day of September, One Thousand Nine Hundred and Seven.

Present:

Honorable William A. Redick, Judge.
G. A. Ireland, Clerk.

Be It Remembered, that heretofore, to-wit, on the 6th day of November, 1907, a petition was filed in the office of the Clerk of said Court in the words and figures following, to-wit:—

63 In the District Court in and for Burt County, Nebraska.

BUD R. LATTA, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY Company, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Wisconsin and Doing Business in the State of Nebraska, Defendant.

Petition.

Comes now the plaintiff and for cause of action against the defendant herein alleges:

That the Chicago, St. Paul, Minneapolis and Omaha Railway Company is now and at all times hereinafter mentioned has been a corporation chartered, organized and existing under and by virtue of the laws of the State of Wisconsin and doing a general railway business in the State of Nebraska; that the said defendant before and at the time of the delivery of the goods and chattels hereinafter next mentioned was, and from thence hitherto hath been, and now is, a common carrier of goods and chattels for hire, from the City of Tekamah, in the County of Burt and State of Nebraska to the City of Omaha in the County of Douglas and State of Nebraska and elsewhere in said State and neighboring States.

The plaintiff herein further alleges that while the said defendant was such common carrier as aforesaid, the said plaintiff, Bud R. Latta, heretofore, to-wit, on or about the ninth day of May 1907 at the City of Tekamah, Burt County, Nebraska, aforesaid caused to be delivered to said defendant and the said defendant then and there accepted and received of and from the said plaintiff certain goods and chattels of the said plaintiff to-wit, two horses of great value, one being a mare and the other a colt of from and by the side of said mare herein mentioned, to be safely and securely carried and conveyed by the said defendant from the said city of Tekamah, Nebraska aforesaid to the City of Waterloo in the State of Iowa, and there, to-wit at the said City of Waterloo Iowa aforesaid safely and securely to be delivered to one Joe McLaughlin for plaintiff, for a certain reasonable reward paid to said defendant by the plaintiff herein in that behalf that the said mare and colt so by plaintiff delivered to and accepted by defendant for the purpose set out above were both of thoroughbred racing stock; that said mare had shown more than ordinary speed on the race course and that by reason of her breeding, speed, disposition and form in racing was of great value to plaintiff as a racing and brood mare and fairly and reasonably worth the sum of $2500.00 and that the said colt by reason of its breeding and promise was fairly and reasonably worth the sum of $500.00. And plaintiff further says that upon such delivery and acceptance it then and there became and was the duty of said defendant to take due and proper care of said goods and chattels and in and about the carriage and conveyance of the same and the delivery thereof as aforesaid.

64

Plaintiff further says that the said defendant not regarding its duty to take due and proper care of said mare and colt and to take due and proper care in the carriage and conveyance of same on or about said ninth day of May 1907 and while said mare and colt were in its possession and under its control took so little and such bad and improper care in the carriage and conveyance of said mare and colt and of the car in which said mare and colt were being conveyed on and over defendant's railroad, and so carelessly and negligently behaved and conducted itself in and about the carriage and conveyance of the same, that the car in which said mare and colt were being conveyed over the said defendant's railroad was permitted to catch on fire and the said mare and colt were thereby burned to death on the day, month and year above mentioned and while in the custody of the said defendant as aforesaid to plaintiff's damage in the sum of $3,000.00.

Plaintiff further alleges that on said ninth day of May 1907, and at the time when he so delivered to said defendant and said defendant so accepted the mare and colt herein set forth for transportation over its lines as aforesaid that he paid to the defendant herein for the service so to be performed by it the sum of $24.38; that by reason of defendant's negligence in permitting said mare and colt 65 to burn that the work contemplated by both parties hereto and on the part of said defendant to be performed was not in fact performed and the money so as aforesaid paid to defendant was not in fact earned by said defendant or any part thereof to plaintiff's damage in the said sum of $24.38.

Plaintiff alleges that by reason of the premises herein he has suffered damages in the sum of $3024.38, no part of which has been paid.

Wherefore plaintiff prays judgment against the defendant herein in the said sum of $3,024.38 together with interest thereon at the rate of seven per cent per annum from the ninth day of May 1907 and for his costs herein expended.

BUD R. LATTA,
By HOPEWELL & HOPEWELL,
His Attorneys.

STATE OF NEBRASKA,
Burt County, ss:

But R. Latta being first duly sworn deposes and says that he is the plaintiff in the above entitled matter, that he knows the contents of the above and foregoing petition and that the statements of fact therein made are true as he verily believes.

BUD R. LATTA.

Subscribed in my presence and sworn to before me this 28th day of October A. D. 1907.

[Notarial Seal W. M. Hopewell, Burt County, Nebraska.]

W. M. HOPEWELL,
Notary Public.

Com. Expires Feb. 9, 1910.

Endorsed: In the District Court in and for Burt County, Nebraska. Bud R. Latta, Plaintiff, vs. The Chicago, St. P., Minn. & Omaha Railway Co. Defendant. Petition. No. 3607 Filed Nov. 6, 1907. G. A. Ireland, Clerk District Court, Burt County, Neb. Hopewell & Hopewell, attorneys for plaintiff.

And afterwards, on the 6th day of November, 1907, there was filed in the office of said Clerk a certain præcipe, in words and figures following, to-wit:

66 *Præcipe.*

District Court, Fourth Judicial District of Nebraska, in and for Burt County.

BUD R. LATTA
vs.
THE CHICAGO, ST. PAUL, MINN., AND OMAHA RAILWAY COMPANY.

To the Clerk of said Court:

Please issue summons in the above entitled cause, and deliver same to the Sheriff of said county. Returnable according to law and endorse for $3024.38 together with interest thereon at seven per cent per annum from May 9th, 1907.

HOPEWELL & HOPEWELL,
Attorney for Pl'ff.

Endorsed: Præcipe District Court, Burt County. Doc. 6 No. 2607. Page 11. Bud R. Latta, Plaintiff, vs. Chicago, St. Paul, Minneapolis, & Omaha Ry. Co., Defendant. Præcipe for Summons. Filed November 6th, 1907. G. A. Ireland, Clerk.

And afterwards, on the 7th day of November, 1907, there was filed in the office of said Clerk a certain summons in words and figures following, to-wit:

Summons (Original).

District Court.

STATE OF NEBRASKA,
Burt County, ss:

To the Sheriff of said County:

You are hereby commanded to notify The Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation, Defendant that it has been sued by Bud R. Latta, Plaintiff in the District Court of the Fourth Judicial District, in and for said County of Burt, and that unless it answer by the 9th day of December, A. D. 1907, the petition of said plaintiff filed against it in the Clerk's office of said Court, such petition will be taken as true, and judgment rendered accordingly.

67 You will make due return of this summons on or before Monday, the 18th day of November, A. D., 1907.

Witness my official signature and the seal of said Court, at Tekamah, this 6th day of November, A. D. 1907.

[Seal Fourth Judicial District Court, Burt County, Nebraska.]

G. A. IRELAND,
Clerk of the District Court.

Endorsed: Original Summons District Court, Burt County, Neb. Bud R. Latta, Plaintiff, against The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendant. If the defendant fail to appear and answer, the plaintiff will take judgment for $3024.38 together with interest thereon at the rate of 7 per cent. from the 9th day of May, 1907, and costs of suit. G. A. Ireland, Clerk District Court. Returned and filed Nov. 7th, 1907. G. A. Ireland, Clerk District Court. No. 2607.

THE STATE OF NEBRASKA,
Burt County, ss:

Received this writ on the 6th day of November, 1907 and I hereby certify that on the 6th day of November, 1907, I served the within writ of summons on the within named The Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation by delivering personally to J. F. Ballinger, Agent of said company a true and duly certified copy of the same with all endorsements thereon, in the County aforesaid as required by law.

L. D. PHIPPS, *Sheriff.*

Fees.

Service	$.50
Copy	.25
Mileage	.10
Total	$.85

68 And afterwards, on the 5th day of December, 1907, there was filed in the office of said clerk a certain petition for removal in words and figures following, to-wit:

In the District Court of Burt County, Nebraska.

BUD R. LATTA, Plaintiff,
v.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Defendant.

Petition for Removal of this Cause to the Circuit Court of the United States for the District of Nebraska, Omaha Division.

Comes now your petitioner, the above named Chicago, St. Paul, Minneapolis & Omaha Railway Company, and shows to the court that the above entitled suit was commenced against it in the District Court of the state of Nebraska, in and for Burt County, on or about the 6th day of November, 1907.

II.

That the Chicago, St. Paul, Minneapolis & Omaha Railway Company is sole defendant in the above entitled action, and that the controversy therein is wholly between citizens of different states; that your petitioner, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant in said action, was at the time of the commencement of this suit, ever since has been and still is a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin and was at the time of the commencement of this suit, ever since has been and still is a citizen and resident of said state, having its principal place of business at the city of Hudson, in said state, and was — at the time of the commencement of this suit, nor since has been and is not now either a citizen or resident of the state of Nebraska; that the plaintiff, Bud R. Latta, was at the time of the commencement of this action, ever since has been and still and now is a resident and citizen of the state of Nebraska, residing in Burt County in said state, and is not and has not been a citizen or resident of the State of Wisconsin.

69 That said suit is of a civil nature, for the recovery of money, to-wit: an action for the recovery of damages in the sum of $3024.38, claimed to have been sustained by the plaintiff by reason of the loss of a mare and colt while being transported over the line of railway of your petitioner, in consequence of the destruction by fire of the car in which said animals were contained, claimed to have been occasioned by the negligence of your petitioner, during the month of May, 1907, and that the matter and amount in dispute in said above entitled action, exclusive of interest and costs exceeds the sum and value of $2,000.00.

IV.

Your petitioner, Chicago, St. Paul, Minneapolis & Omaha Railway Company, offers herewith a good and sufficient bond, conditioned for its entering in said Circuit Court of the United States for the District of Nebraska, Omaha Division, on or before the first day of its next session in said division, a copy of the record of this suit, and for its paying all costs that may be awarded by said Circuit Court if said court shall hold that the suit was wrongfully or improperly removed thereto; and it prays this court to proceed no further herein except to make an order for removal and to accept the surety and bond, and to cause said record herein to be removed to said Circuit Court of the United States for the District of Nebraska, Omaha Division.

CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY,
By B. T. WHITE,
C. C. WRIGHT &
B. H. DUNHAM,
Its Attorneys.

STATE OF NEBRASKA,
Douglas County, ss:

B. H. Dunham, being first duly sworn, on oath deposes and says that he is one of the duly authorized attorneys for the Chicago, St. Paul, Minneapolis & Omaha Railway Company, your petitioner; that he has read the above and foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true, as he believes.

B. H. DUNHAM.

70 Subscribed in my presence and sworn to before me this 4th day of December, A. D. 1907.

[Notarial Seal Lyle E. Jackson, Douglas County, Nebraska.]

LYLE E. JACKSON,
Notary Public.

Commission Expires Mar. 24, 1912.

Endorsed: In the District Court of Burt County, Nebraska. Bud R. Latta, Plaintiff, v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, Defendant. Petition for removal. No. 2607. Filed Dec. 5, 1907. G. A. Ireland, Clerk District Court Burt County, Neb.

And afterwards, on the 5th day of December, 1907, there was filed in the office of said Clerk a certain bond on removal in words and figures following, to-wit:

In the District Court of Burt County, Nebraska.

BUD R. LATTA, Plaintiff,
v.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Defendant.

Bond for Removal of this Cause to the Circuit Court of the United States for the District of Nebraska, Omaha Division.

Know All Men By These Presents: That the Chicago, St. Paul, Minneapolis & Omaha Railway Company, as principal, and Peter Whitney, as surety, are each *and* severally held and firmly bound unto Bud R. Latta in the sum of Five Hundred Dollars ($500.00), for the payment whereof, well and truly to be made unto the said Bud R. Latta, his executors, administrators, successors, heirs, and assigns, we bind ourselves, our and each of our, heirs, executors, administrators, successors and assigns, jointly and firmly by these presents; 71

Yet upon these conditions: The Chicago, St. Paul, Minneapolis & Omaha Railway Company, having petitioned the District Court of Burt County, Nebraska, for the removal of the above entitled cause therein pending, wherein the said Bud R. Latta is plaintiff and the Chicago, St. Paul, Minneapolis & Omaha Railway Company is defendant, to the Circuit Court of the United States in and for the District of Nebraska, Omaha Division;

Now, Therefore, if the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, your petitioner, shall enter in said Circuit Court of the United States for the District of Nebraska, on or before the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands this — day of December, A. D. 1907.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
By B. H. DUNHAM, *Its Attorney.*
PETER WHITNEY, *Surety.*

STATE OF NEBRASKA,
Douglas County, ss:

I, Peter Whitney, of said County, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident and citizen of the State of Nebraska and a freeholder therein; that I am worth the sum of one thousand dollars ($1000.00) over and above all my debts and liabilities and exclusive of property by law exempt from execution; That I have property in the State of Nebraska liable to execution of the value of more than One Thousand Dollars ($1000.).

PETER WHITNEY.

72 Subscribed in my presence and sworn to before me by Peter Whitney, this 4th day of December, A. D. 1907.

[Notarial Seal Lyle E. Jackson, Douglas County, Nebraska.]

LYLE E. JACKSON,
Notary Public.

Commission Expires Mar. 24, 1912.

The foregoing bond and surety thereon are hereby accepted and approved this 4th day of December, A. D. 1907.

WILLIAM A. REDICK, *Judge.*

Endorsed: In the District Court of Burt County, Nebraska, Bud R. Latta, Plaintiff, v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, Defendant. Bond on Removal. No. 2607 Filed Dec. 5, 1907. G. A. Ireland, Clerk District Court, Burt County, Neb.

And afterwards, on the 5th day of December, 1907, there was filed and entered of record in Journal Volume 9 at page 246, in the office of said Clerk a certain order for removal in words and figures following, to-wit:

In the District Court of Burt County, Nebraska.

BUD R. LATTA, Plaintiff,
v.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Defendant.

Order for Removal of This Cause to the Circuit Court of the United States for the District of Nebraska, Omaha Division.

Now, to-wit, on this 4th day of December, 1907, this cause coming on for hearing upon the petition of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant herein, for an 73 order transferring this case to the United States Circuit Court for the District of Nebraska, Omaha Division; and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and has filed its bond duly conditioned with good and sufficient sureties as provided by law; and it appearing to the court that this is a proper cause for removal to said Circuit Court;

Now, Therefore, it is hereby ordered and adjudged, that this cause be and is hereby removed to the Circuit Court of the United States for the District of Nebraska, Omaha Division, and that the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

(Signed) WILLIAM A. REDICK, *Judge.*

STATE OF NEBRASKA,
Burt County, ss:

I, G. A. Ireland, Clerk of the District Court in and for Burt County, Nebraska, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of Bud R. Latta, against The Chicago, St. Paul, Minneapolis and Omaha Railway Company as fully as the same remains on file and of record in my office.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said District Court this 6th day of December, A. D. 1907.

[SEAL.] G. A. IRELAND, *Clerk.*

Transcript and certificate fee in the sum of $3.20 paid by defendant's attorneys.

Dec. 13th, 1907.

G. A. IRELAND,
Clerk District Court.

Endorsed: Filed Jan. 23, 1908. Geo. H. Thummel, Clerk.

74 UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby Certify the foregoing to be a true and correct copy of Transcript of Removal from the District Court of Burt County, Nebraska, in case of Bud R. Latta vs. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, No. 64 Docket "Y" as the same appears of record in my office.

Witness my hand and the seal of said Court at Omaha in said District this 23rd day of December, A. D. 1910.

[SEAL.] GEO. H. THUMMEL, *Clerk,*
By JOHN NICHOLSON, *Deputy.*

(Endorsed:) No. 3444. No. 64 Doc. "Y" United States Circuit Court, District of Nebraska. Omaha Division Bud R. Latta Def't in Error, advs. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Pl'ff in Error. Certified copy of Transcript of Removal from the District Court of Burt County, Nebraska. Supplemental Transcript. Filed Jan. 4, 1911, per stipulation, John D. Jordan, Clerk.

(Appearance of Counsel for Plaintiff in Error.)

And on the twenty-eighth day of July, A. D. 1910, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3444.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Plaintiff in Error,
vs.
BUD R. LATTA.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

75

B. T. WHITE,
C. C. WRIGHT, &
B. H. DUNHAM,
Omaha, Neb.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3444. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Plaintiff in Error, vs. Bud R. Latta. Appearance. Filed Jul. 28, 1910, John D. Jordan, Clerk. B. T. White, C. C. Wright, B. H. Dunham, Counsel for Plaintiff in Error.

(Appearance of Counsel for Defendant in Error.)

And on the twenty-second day of August, A. D. 1910, the appearance of counsel for defendant in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3444.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RY. CO., Plaintiff in Error,
vs.
BUD R. LATTA.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

H. C. BROME.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3444. Chicago, St. Paul. Minn. & Omaha Ry. Co., Plaintiff in Error, vs. Bud R. Latta. Appearance. Filed Aug. 22, 1910, John D. Jordan, Clerk. H. C. Brome, Counsel for Defendant in Error.

(Order of Submission.)

And on the eleventh day of January, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of submission, in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

No. 3444.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
vs.
BUD R. LATTA.

In Error to the Circuit Court of the United States for the District of Nebraska.

WEDNESDAY, *January* 11, 1911.

This cause having been called for hearing in its regular order, was argued by Mr. B. T. White in behalf of the plaintiff in error and submitted upon brief by Mr. H. C. Brome in behalf of the defendant in error.

Thereupon this cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Judgment.*)

And on the eleventh day of January, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

No. 3444.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Plaintiff in Error,
vs.
BUD R. LATTA.

In Error to the Circuit Court of the United States for the District of Nebraska.

WEDNESDAY, *January* 11, 1911.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs on the authority of the opinion of this Court in the former cause between the same parties (172 Fed., 850; 97 C. C. A., 198); and that
77 Bud R. Latta have and recover against the Chicago, St. Paul, Minneapolis and Omaha Railway Company the sum of twenty dollars for his costs herein and have execution therefor.

January 11, 1911.

78 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains full, true and complete copies of all the pleadings, record entries and proceedings (except the transcript of record from the Circuit Court of the United States for the District of Nebraska), in a certain cause in said Court wherein the Chicago, St. Paul, Minneapolis and Omaha Railway Company is Plaintiff in Error, and Bud R. Latta is Defendant in Error, No. 3444, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the City of St. Louis, Missouri, this eighteenth day of January, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

79 In the United States Circuit Court of Appeals for the Eighth Circuit.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Petitioner,
v.
BUD R. LATTA, Respondent.

Stipulation.

Whereas, in the above entitled case a writ of certiorari was issued on the 20th day of April, A. D. 1911, by the Supreme Court of the United States directed to the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit, directing the record and proceedings in the above entitled cause be sent to said Supreme Court so that it may act thereon as of right and according to law ought to be done;

Now, therefore, it is hereby stipulated by counsel for the respective parties above named that the certified transcript of record of all proceedings had in said Circuit Court of Appeals now on file with the Clerk of the Supreme Court of the United States, shall be taken as a return to said writ of certiorari, and the Clerk of the United States Circuit Court of Appeals is requested to file this stipulation in his office and send a certified copy of the same to the Clerk of the Supreme Court of the United States as his return to the command of said Supreme Court.

Dated this 26 day of April, A. D., 1911.

BENJAMIN T. WHITE,
Counsel for Petitioner.
H. C. BROME,
Counsel for Respondent.

(Endorsed:) In the United States Circuit Court of Appeals for the Eighth Circuit. No. 3444. Chicago, St. Paul, Minneapolis & Omaha Railway Company, Petitioner, v. Bud R. Latta, Respondent. Stipulation as to return to Writ of Certiorari. Filed Apr. 27, 1911, John D. Jordan, Clerk.

80 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Chicago, St. Paul, Minneapolis & Omaha Railway Company is plaintiff in error, and Bud R. Latta is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Nebraska, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you
81 send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20th day of April, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

82 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Chicago, St. Paul, Minneapolis and Omaha Railway Company, Plaintiff in Error, vs. Bud R. Latta, No. 3444, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-seventh day of April, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 22,549. Supreme Court of the United States, No. 928, October Term, 1910. Chicago, St. Paul, Minneapolis & Omaha Railway Company vs. Bud R. Latta. Writ of Certiorari. Filed Apr. 27, 1911. John D. Jordan, clerk.

83 [Endorsed:] File No. 22,549. Supreme Court U. S. October Term, 1910. Term No. 928. Chicago, St. Paul, Minneapolis & Omaha Railway Company, Petitioner, vs. Bud R. Latta. Writ of certiorari and return. Filed April 29, 1911.

19

Office Supreme Court, U. S.
FILED.
FEB 14 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT
OF THE
United States

OCTOBER TERM, 1911

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Petitioner,
vs.
BUD R. LATTA,
Respondent.

No. 231.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONER

JAMES B. SHEEAN
CARL C. WRIGHT
B. H. DUNHAM
Attorneys for Petitioner.

SUPREME COURT
OF THE
United States

OCTOBER TERM, 1911

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Petitioner, vs. BUD R. LATTA, Respondent.	No. 523

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONER

STATEMENT

On November 6, 1907, Bud R. Latta, respondent herein, began this action in the District Court of Burt County, Nebraska, against the petitioner herein to recover the sum of $3,024.38, with interest and costs, for the alleged negligent loss by fire of two horses while being transported from Tekamah, Nebraska to Waterloo, Iowa. Said cause was thereafter removed to the United States Circuit Court for the District of Nebraska and was there tried (Record pp. 55-59 inc.) The answer admitted the shipment of the animals; their loss while in the possession of the petitioner, and denied any negligence on its part. As a defense, it alleged that the petitioner was an interstate carrier and subject to the laws of Congress, relating to such carriers; that the transportation of said animals was undertaken as a part of an interstate carriage; that by virtue of the laws of the United States it was required to file with the Interstate Commerce Commission, and to publish its schedule of rates and charges, together with all rules and regulations in any way or manner affecting its charges for the transportation of property, and that by virtue of said laws the petitioner was prohibited from charging or collecting a greater, or less, or different, consideration from that named in its tariffs. That long prior to the date of the shipment of said animals, the petitioner filed and published as required by law its schedule of rates and charges and its rules and regulations applying to shipments of livestock; that by virtue of its said tariffs, rules and regulations it was provided that the rates and charges in its tariffs were based upon the value declared by a shipper when the value of each horse did not exceed $100. And that when the declared value thereof exceeded that sum, an addition of 25 per cent would be made to the rate per 100 pounds; that the rate upon said mare if shipped from Tekamah to Waterloo, in accordance with said tariffs at the declared valuation of $100 was 30 cents per hundred pounds and the rate on the colt was 45 cents per hundred pounds.

The answer further alleged that the petitioner accepted said animals for transportation only in accordance with the terms of its tariffs and of a shipping contract signed by the respondent, wherein he declared the value of each of said animals to be $100; that said respondent did then and thereby represent that sum to be the value of said animals; that relying on such representation the petitioner accepted said animals for shipment at the rate named in said contract and embodied in its tariffs and would not have accepted them on such terms if the true value had been declared. That by reason of these facts, the respondent is estopped from recovering more than $200 for the loss of said animals. As a further defense it was alleged in the answer that by virtue of the Interstate Commerce Act the petitioner was prohibited from paying, and it would be unlawful for it to pay said respondent any sum ni excess of $200, and that the constitution of Nebraska does not determine the rights or contracts of the parties growing out of the shipment of said animals.

In the reply the respondent admitted the interstate character of the petitioner and of the shipment in question, and admitted that the tariffs and schedules set up in the answer and in force when said shipment was made were filed with the Interstate Commerce Commission as required by law. At the trial it was again admitted that said tariffs and schedules were duly filed and published as required by law (Record, p. 40). The reply also admitted the execution of the shipping contract referred to in the answer, and did not in any way seek to impeach its validity or question the reasonableness of the valuation therein named, or allege any want of notice to the respondent of the terms of said shipping contract.

The undisputed evidence established that the respondent resided at Tekamah and was engaged in the live stock business; that for more than twenty years he had been shipping over the lines of the petitioner (Record, pp. 21, 28), and during all that time had personally attended to his business. That on May 9, 1907, he shipped a mare weighing 2,000 pounds, and a colt weighing 750 pounds, from Tekamah to Waterloo, and that both animals were burned shortly after leaving Tekamah. That when tendering said animals for shipment, the respondent made a declaration as to the value of each of said animals by signing what is designated in the record as a live stock contract (Record, pp. 29, 35, Exhibit 1). The figures "$100" appearing in said contract at page 31 of the record were written in with pen and ink prior to the signing of the contract. This contract, bill of lading or declaration of value showed the value declared by the respondent, the rate applicable to such valuation, the parties to the shipment and the initial and terminal points. It also recited that the shipment was accepted and forwarded subject to the agreed valuation and that the rate of freight was based on the condition that the carrier assumed liability only to the extent of such agreed valuation. A shipping order containing the above declaration of value was also signed by the respondent and directed the shipment to be made in accordance with the tariffs and classifications in effect at the date of the order (Record, p. 36, Exhibit 2).

No evidence was offered tending to impeach the good faith of the contract or to prove that the respondent executed it under duress or fraud, or without a full knowledge of its terms and of the existing tariffs, rules and regulations. Neither was any evidence offered tending to question the reasonableness of said tariffs, rules and regulations, nor that $100 represented the value of the average horse, nor that the rates for the carriage of horses of a greater value were arbitrary, unreasonable or unsatisfactory to the respondent.

The first trial of said cause was had on October 15, 1908, and resulted in a verdict for the respondent, directed by the Court in the sum of $200. From the judgment entered thereon the respondent prosecuted error to the United States Circuit Court of Appeals for the Eighth circuit, which reversed said judgment and remanded the case for a new trial (Latta vs. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 172 Fed., 850, 97 C. C. A., 198). Thereafter, said cause having been remanded to the Circuit Court of the United States for the District of Nebraska, a second trial thereof was had on April 16, 1910, which resulted in a verdict for the respondent, directed by the Court in the sum of $3,583. **Neither the Court nor the jury made any finding that the loss of said animals was caused by the petitioner either negligently or otherwise, and the evidence did not conclusively establish such fact.** The evidence on this trial was substantially the same as on the first trial. From the judgment entered upon this verdict the petitioner prosecuted error to said Circuit Court of Appeals, which on January 11, 1911, affirmed said judgment on the authority of its opinion rendered on the former hearing of said cause (Record, p, 62). The petitioner thereafter removed said cause to this court by certiorari.

LEGAL PROPOSITIONS INVOLVED.

1.

State laws touching bills of lading issued on interstate shipments or defining the liability of car-

riers thereunder, or prohibiting limitations on such liability, have been superseded by the Commerce Act, approved June 29, 1906.

2.

A declaration of value made in the shipping contract and embodied in the tariff does not exempt the carrier from the liability imposed by the Carmack Amendment to the Commerce Act.

3.

The proviso to the Carmack Amendment does not confer power upon the states to nullify the Commerce Act or keep alive the laws of said states inconsistent with that Act.

4.

The constitution of Nebraska, as construed by the supreme court of that state, forbids common carriers from limiting their liability as it existed at common law, no more and no less, and this court is at liberty in this case to determine for itself what was a carrier's liability at common law.

5.

An agreement that damages shall not exceed the value declared for the purpose of securing a lower rate of transportation, is not a limitation of liability as it existed at common law.

6.

A declaration of value made by a shipper for the purpose of securing a lower rate, estops him from afterwards recovering damages in excess of the value so declared.

7.

A false declaration of value, made for the purpose of securing a lower rate, is denounced as a crime by Section 10 of the Commerce Act, and public policy forbids the recovery of damages in excess of the value declared.

SPECIFICATIONS OF ERROR.

1.

The Circuit Court of Appeals erred in affirming the judgment against the petitioner for an amount in excess of $200 and interest.

2.

Said court erred in affirming a judgment in favor of the respondent for the sum of $3,583, in view of the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and its amendments and supplements, and particularly in view of Section 20 thereof.

3.

Said court erred in holding that the rules and regulations contained in the published tariffs of the petitioner, which require the shipper to declare the value of his horses, were invalid because in conflict with the law of Nebraska.

4.

Said court erred in disregarding the illegal and fraudulent acts of the respondent and in affirming a judgment based thereon.

I

STATE LAWS TOUCHING BILLS OF LADING ISSUED ON INTERSTATE SHIPMENTS OR DEFINING THE LIABILITY OF CARRIERS THEREUNDER OR PROHIBITING LIMITATION ON SUCH LIABILITY, HAVE BEEN SUPERSEDED BY THE COMMERCE ACT AS AMENDED JUNE 29TH, 1906.

The Act of Congress approved February 4th, 1887, entitled "An Act to regulate Commerce" with its amendments and supplements thereto, has superseded all state laws prescribing the form, terms and conditions of bills of lading on interstate shipments, and defining the liability of carriers arising thereon and prohibiting limitations of or exemptions from such liability.

If it were not for the proviso to the so-called Carmack Amendment this statement would, no doubt, meet with general approval. The Amendment requires the carrier to issue a bill of lading and defines the carrier's liability thereon and forbids it to exempt itself from such liability. It covers all matters relating to the shipping contract and leaves nothing for the operation of state laws or special agreement of the parties. It deals with a matter specially calling for national regulation, and state laws in conflict therewith must fall.

Mondov vs. New York, etc. R. Co. U. S. Supreme Court, No. 120. Opinion filed January 15, 1912.

McCulloch vs. Maryland 4 Wheat. 316.

Addyston Pipe & Steel Co. vs. U. S., 175 U. S., 211;

Gulf & Colorado R. Co. vs. Helfley, 158 U. S., 99;

Fulgram vs. Midland Valley R. Co., 167 Fed., 660;

Chicago, etc. R. Co. vs. Solan, 169 U. S., 133;

Penn. R. Co. vs. Hughes, 191 U. S., 477.

Since the passage of the Commerce Act the status of shipper and carrier has ceased to be a matter of contract, but is fixed by law. As was said in Arkansas Fertilizer Co. vs. U. S., Number 42 Commerce Court Decisions, filed December 5, 1911.

"The relations between shipper and carrier are no longer contract relations, and the rights and obligations of both are fixed, not by mutual agreement, but by the mandate of the statute." The carrier must now file and publish its tariff, and shipper and carrier are alike bound by its terms. Neither can legally depart from the rules and regulations contained therein, nor from the rate thereby established. Both are conclusively presumed to know the rate and the terms and conditions under which the rate applies. Neither the law of Nebraska nor an agreement of parties can modify or impair the provisions of the act. It applies to all interstate commerce. Such being the status now existing between the shipper and carrier as to interstate commerce, it follows that the Commerce Act must supersede all agreements and all laws seeking to establish another status or relation. The opinion of the Circuit Court of Appeals rendered in this case (Latta vs. R. R. Co., 172 Fed., 850) conceded that by the Carmack Amendment Congress has legislated on the subject of the liability of railroads engaged in interstate commerce and assumes that such legislation would supersede all state laws on the subject but for the proviso to that amendment.

II

A DECLARATION OF VALUE MADE IN THE SHIPPING CONTRACT AND EMBODIED IN THE TARIFF DOES NOT EXEMPT THE CARRIER FROM THE LIABILITY IMPOSED BY THE CARMACK AMENDMENT TO THE COMMERCE ACT.

The Carmack Amendment imposes a liability on the initial carrier for any loss, damage, or injury **caused by it** or by any carrier participating in the transaction and declares void any contract receipt, rule or regulation which "exempts" the initial carrier from the liability so imposed. In the case at bar, the trial court **instructed** a verdict for the respondent. There was therefore no finding of the jury nor of the Court that the loss of respondent's horses was (negligently or otherwise) **caused by** the petitioner or by any other carrier. Neither did it conclusively appear from the record that the loss was so caused. There was therefore no liability imposed on the petitioner by this amendment, and there is nothing contained therein from which it could seek exemption. Assuming, however, for the agrument which follows that such liability was imposed, neither the declaration of value nor the contract limiting the damages "exempts" the petitioner from liability.

On the contrary, each is an assumption of liability to the full extent of the value of the horses as declared by the respondent, and as agreed upon by the parties. In the **Hart Case supra,** this Court has distinguished between contracts **exempting** the carrier from liability, and those imposing **reasonable limitations** on such liability as follows:

"It is the law of this Court that a common carrier may, by special contract limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his negligence or that of his servants." (Page 338).

"The limitation as to the value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence." (Page 340).

The following cases emphasize the same distinction between exemptions and reasonable limitations, and are cited for convenient reference.

Express Company vs. Caldwell 21 Wall 264;
The Kensington 183 U. S. 263;
Jennings vs. Smith 106 Fed. 139;
Macfarlane vs. Adams Express 137 Fed. 982;

Taylor vs. Weir, 162 Fed. 585;
George N. Pierce Co. vs. Wells Fargo & Co. 189 Fed. 561;
Blackwell vs. Southern Pacific R. Co. 184 Fed. 489;
Ullman vs. Chicago & Northwestern R. Co. 112 Wis. 150;
Zimmer vs. New York Central R. Co. 137 N. Y. 460;
Penn. R. Co. vs. Shearer, 75 Ohio State, 249;
Graves vs. Lake Shore & Michigan R. Co. 137 Mass. 33;
Alair vs. Northern Pacific R. 53 Minn. 160;
Harvey vs. Terra Haute R. Co. 74 Mo. 538;
Railroad Co. vs. Lowell, 90 Tenn. 17;
Ballou vs. Earl, 17 Rhode Island 441;
Atkinson vs. New York Transfer Co. 76 N. J. L. 608.

The foregoing cases were decided prior to the Amendments to the Commerce Act of 1906, and specifically decide that an agreement fixing the value for the purpose of securing a lower rate, is not an exemption from liability.

The construction here contended for has been put upon the Carmack Amendment by the courts of several of the states in the following cases:

Bernard vs. Adams Exp. Co., 205 Mass. 254; 91 N. E. 325;
Greenwald vs. Barrett, 199 N. Y. 170; 92 N. E. 218;
Fry vs. Sou Pac. Ry. Co. 247 Ill. 564; 93 N. E. 909;
Travis vs. Exp. Co., 79 N. J. Law 83; 74 Atl. 444;
Larsen vs. O. S. L. Ry. 110 Pac. 983, 986 (Utah).
Fielder vs. Exp. Co. 71 S E. 99, 101 (W. Va.)

That Amendment now fixes the rights and obligations of shipper and carrier. Tariffs filed and published as required by the Commerce Act, are as to matters properly embraced therein, as binding upon the parties as a law of Congress. Section 6 of the Act requires carriers to establish and publish as a part of their tariffs "All privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the passenger, shipper, or consignee." When rates are based on a declared valuation, the tariff rules or regulations must state every condition, which in anywise change, affect or determine any part of the rate. Rates based on such valuation are authorized by the Commerce Act, and when properly published are binding upon all.

In re Released Rates I. C. C. Rep 550.
George N. Pierce Co. vs. Wells Fargo & Co., 189 Federal 561, 565.

The reasonableness of rates rules and regulations so established is subject to the control of the Commerce Commission and cannot be questioned in a collateral proceeding.

Texas & Pacific R. Co. vs. Abilene Cotton Oil Co. 204 U. S. 426;
B. &. O. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481;
I. C. C. vs. Ill. Cen. R. Co. 215 U. S. 452.

In view of the foregoing considerations, and the record herein, it appears that the Carmack Amendment imposed no liability on the petitioner, and if such liability were imposed, the declaration of value made by the respondent, did not in any way "exempt" the petitioner from liability.

III

THE PROVISO TO THE CARMACK AMENDMENT DOES NOT CONFER POWER UPON THE STATES TO NULLIFY THE COMMERCE ACT OR KEEP ALIVE THE LAWS OF THE STATES INCONSISTENT WITH THAT ACT.

The Circuit Court of Appeals ,while conceding that Congress has legislated upon the subject of rates and bills of lading affecting interstate shipments, held that the proviso to the Carmack Amendment saves existing remedies and rights of action, thereby continuing in full force and effect Section 4 of Article XI of the constitution of Nebraska providing that "The liability of railroad corporations as common carriers shall never be limited," and that a declaration of value or an agreement as to the amount of recovery made for the purpose of securing a lower rate, is repugnant to this provision as interpreted by the supreme court of the state of Nebraska. The answer to such construction of this proviso is as follows:

(1) **The proviso only saves to the shipper his remedies and rights of action. It does not relate to the amount of his recovery, but only to his right to recover.**

Bouvier defines a **remedy** as, "The means employed to enforce a right or redress of an injury;" and **right of action** as, "The right to bring suit in a case."

To the same effect are:

Rapalje and Lawrence Law Dictionary, 1132;
Anderson Law Dictionary, 27;
Hibbard vs. Clark, 56, N. H., 155;
Boody vs. Watson, 64, N. H., 162;
Lumm vs. Buckeye, 45 Miss., 564, 566.

The terms are, therefore, synonymous, and it will be noted that the indefinite article "any" is used in the proviso only once, indicating that "remedy" and "right of action" are interchangeable. The evident purpose of the proviso was to prevent the shipper from being deprived of any right to bring suit or of any remedy appropriate to that right. His right of action should not be confused with the measure of the carrier's liability. The enforcement of a declaration of value, or an agreement as to the amount of recovery made to secure a lower rate, does not impair any remedy or right of action of the shipper. The proviso saves his right to bring suit against the carrier but does not save the amount of his recovery. It saves him the right to sue in assumpsit or in trespass and gives him the same remedy and right of action he had before the amendment was adopted.

(2) **The proviso saves to the shipper the right he had to sue the last carrier or other carriers causing the damage.**

Among other things, the Carmack Amendment creates a new right of action in the shipper to recover from the initial carrier when the loss was caused by a connecting carrier. It is a general rule of construction that when a statute creates an entirely new right and entirely new duty, and prescribes a particular remedy whereby the party injured by a breach of the statutory duty may obtain redress, such remedy is exclusive and that none other will lie (1 Cyc., 707; Farmers, Etc. Natl. Bank vs. Dearing, 91 U. S., 29, 35). Were it not for the proviso, the right of the shipper to sue the initial carrier might have been held to have been substituted for his right of action against the defaulting carrier. The effect of the proviso is to save to the shipper his existing right to sue the final or connecting carrier.

(3) **The proviso saves to the shipper his rights as they existed at common law and were recognized and enforced by the courts of the United States.**

The liability imposed upon the initial carrier by the amendment is for loss or damage caused by it or caused by connecting carriers. At common law the carrier was liable as an insurer, subject to well recognized exceptions. Loss and damage to goods in transit frequently occurs without being caused by the carrier. If there were no proviso to the amendment, the carrier's liability would be limited to the causes named in the amendment, and the shipper would have to bear his own loss. By the proviso, however, Congress has saved to the shipper his rights against the carriers as insurers as well as against the carrier actually at fault. It must also be true that Congress having undertaken to establish uniformity as to bills of lading and to define the carriers' liability thereunder, had in view the laws of the United States and the common law as construed by the courts thereof. From an inspection of the Act there appears to be no intention on the part of Congress to delegate to the states concurrent jurisdiction over this subject, and having once acted on a subject of this character, the power of Congress to delegate such control is in doubt. Certainly such delegation should be by express statute and should not be left to rest upon the indefinite language of this proviso.

(4) **This proviso does not confer on the states concurrent jurisdiction with Congress to regulate interstate bills of lading and to fix the liability of carriers thereunder.**

The purpose of the Commerce Act was to secure uniformity and equality and to prevent unlawful discrimination. If the proviso be construed to continue in force all the laws of all the states, the purpose of the Commerce Act will be materially weakened, if not destroyed. Such a construction means that a shipper in Nebraska, relying on the law of that state, can by concealing or misrepresenting the real value, secure a rate of transportation lower than a shipper in Minnesota. The courts of the former state deny the validity of a carriers' interstate tariffs, and the courts of the latter recognize the binding force thereof. Fraud and estoppel are no defense in the one state to such false valuation, and in the other they are enforced. The amount recovered in all cases must therefore depend upon the law of the forum and the place of contract. Many other instances of discrimination and lack of uniformity and equality might be cited to illustrate the results to follow the construction placed on this proviso by the Circuit of Appeals. They are so intolerable that if possible, a construction should be given the proviso which will not destroy in whole or in part the purpose and object of the Carmack Amendment.

A situation similar to that presented by this proviso arose in the case of the Texas & Pacific Ry. vs. Abilene Cotton Oil Co., 204 U. S., 42, and the proviso there under consideration was as follows:

"Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The construction placed upon this proviso by this court was as follows:

"This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the Act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the Act."

This proviso in Section 22 of the Commerce Act had a much more direct bearing on the Abilene Company's contention than has the proviso in the Carmack Amendment on that of the petitioner in the case at bar. This court construed that proviso to take away entirely from the Abilene Company the remedy existing at common law at the time of the passage of the act. In the case at bar the construction of the Carmack Amendment for which we are contending does not deprive the respondent of any remedy or right of action; it merely affects the rule as to the amount of his recovery, or as to the validity of his agreement as to the value of his horses. The effect of the Abilene decision is not weakened by the fact that the proviso there in question applied to the "remedy" and did not include the "right of action," (if there is any material distinction between these terms) for the reasoning of the opinion would certainly have led to the same decision if both terms had been used.

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If the proviso in question is to be construed as saving to the shipper all the laws of the several states and thus destroy the uniformity and equality contemplated by the Carmack Amendment, it follows necessarily from the Abilene case that said proviso must not be so construed as to bring about a result inconsistent with the other provisions of that amendment.

From the foregoing considerations it is evident that the Circuit Court of Appeals erred in giving effect to the constitution of Nebraska and in ignoring the duly established tariffs of the petitioner. For the purposes of the argument which follows, it will be assumed that the proviso to the Carmack Amendment saves to the shipper the right to enforce all the laws of all the states, and in particular the right to rely upon the constitution of Nebraska.

IV.

THE CONSTITUTION OF NEBRASKA AS CONSTRUED BY THE SUPREME COURT OF THAT STATE FORBIDS COMMON CARRIERS FROM LIMITING THEIR LIABILITY AS IT EXISTED AT COMMON LAW, NO MORE AND NO LESS; AND THIS COURT IS AT LIBERTY IN THIS CASE TO DETERMINE FOR ITSELF WHAT IS A CARRIER'S LIABILITY AT COMMON LAW

Section 4 of Article XI of the Constitution of Nebraska provides that "The liability of railroad corporations as common carriers shall never be limited." (Section 638 Cobbey's Ann. Statutes of Nebraska 1909.) Section 6955 of said Statutes provides that "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this territory, is adopted, and declared to be law within said territory."

The Supreme Court of that State is construing the Constitutional provision held that the word, "liability" as used therein meant liability as it existed at common-law.

Fremont Elkhorn Ry. Co. vs. Waters, 50 Neb. 592.

Fremont Elkhorn Ry. Co. vs. State Bank 66 Neb. 165.

Union Pacific Ry. Co. vs. Metcalf 50 Neb. 452.

This construction is binding upon this Court. Other decisions of the Supreme Court of Nebraska, however, wherein it decides what liabilities exist at common law are not binding upon this Court. When holding that contracts somewhat similar to the one relied on herein, limit a carrier's liability as it existed at common law, the Nebraska Court placed its own construction on the common law. This Court, however, is at liberty to follow its own decisions to the contrary. The Circuit Court of Appeals, therefore erred in assuming that the construction given to the common law by the Nebraska Court was binding upon this Court.

V.

AN AGREEMENT THAT DAMAGES SHALL NOT EXCEED THE VALUE DECLARED FOR THE PURPOSE OF SECURING A LOWER RATE OF TRANSPORTATION IS NOT A LIMITATION OF LIABILITY AS IT EXISTED AT COMMON LAW.

The rule [illegible] carrier [illegible] [illegible] at common law [illegible] damage [illegible] [illegible] lently concealed the nature or value of the shipment for the purpose of avoiding payment of increased reasonable charges for transportation. In such case the carrier was not liable for loss or damage to the shipment.

Bradley vs. Waterhouse 3 C & P 318. M. & M. 154.
Clay vs. Williams, 1 H. Bl. 298.
Walker vs. Jackson, 10 M. & W. 161.
Magnin vs. Dinsmore, 62 N. Y. 35.

The early English law permitted a carrier to limit its liability by notice or special agreement. Afterwards that law was so modified as to forbid such limitation in case of gross negligence or misfeasance. The inability of the carrier to prove the shipper's knowledge of such notice led to the passage of the English Land Carriers' Act II Geo. IV & I Wm. IV Chap. 68. That act provides that shippers must inform the carrier of the value of the article shipped whenever the value could not be clearly ascertained from its appearance, and that the carrier should not be liable in case of loss or damage, when the value of the article exceeded ten pounds unless at the time of shipment its nature and value were stated and an increased charge paid for its transportation. This act was construed to apply to livestock.

Hill vs. London Ry. Co., 42 L. T. N. S. 513.

It has long been the settled law of England and of the Federal Courts, that a declaration of value or an agreement limiting damages made for the purpose of securing a lower rate, is not a limitation of a carrier's liability as it existed at commonlaw. On the contrary, such declarations and agreements have been held to be an assumption of liability to the full limit of the value of the property as declared or agreed upon by the parties.

The petitioner therefore submits that the contract fixing and declaring the value of respondent's horses is valid, and not in conflict with the Constitution of Nebraska. The Supreme Court of that State has construed the word "liability" appearing therein to mean "liability as it existed at common law." Adopting that construction, this Court is at liberty to follow its own decisions sustaining the validity of such an agreement or declaration as not a limitation of liability, and the Court of Appeals erred in not doing so. For the purpose of the argument which follows, it will be assumed that this Court must follow the construction given to the common-law by the Supreme Court of Nebraska, and must disregard its own construction thereof.

VI.

A DECLARATION OF VALUE MADE BY A SHIPPER FOR THE PURPOSE OF SECURING A LOWER RATE ESTOPS HIM FROM AFTERWARDS RECOVERING DAMAGES IN EXCESS OF THE VALUE SO DECLARED.

The petitioner insists that under the facts of this case the respondent is estopped to deny his contract limiting damages to the amount declared for the purpose of securing a lower rate, and is estopped from recovering more than the damages agreed upon. All the elements of an estoppel were present when he tendered his horses for shipment; he falsely represented and concealed the value thereof, a material fact of which he had actual knowledge, and the petitioner had no knowledge of the real value, and no means of acquiring such knowledge. This misrepresentation was made by the respondent with the intention that it should be acted upon, and the petitioner acted thereon to its prejudice. It did not hold itself out as a carrier of horses of a value in excess of $800.-00, and if it had had knowledge of the actual value it would not, and could not, have legally transported these horses. The petitioner had no facilities for the carriage of such valuable horses, and did not, in its tariffs, undertake to do so. (Record p-40, Exhibit 3). Carriers by express do have such facilities, and by their tariffs undertake the carriage thereof.

This Court has always applied the doctrine of estoppel, the facts warranting, to prevent fraud and imposition. Good faith and fair dealing require that the shipper shall be bound by the representations which have advantaged him.

Hart vs. Penn. R. Co., 112 U. S. 331,
Jennings vs. Smith, 106 Fed. 139,
Macfarlane vs. Adams Express Co., 137 Fed. 982.
Taylor vs. Weir, 162 Fed. 585,
Ullman vs. Chicago & Northwestern R. Co., 112 Wis. 150.

Other cases sustain the contention that the respondent is estopped to deny the validity of his agreement.

In Daniels vs. Tearney, 102 U. S., 415, 421, this Court say:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."

In United States vs. Hodson 77, U. S. 395, 409, this court say:

"Where a bond is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors."

In Ferguson vs. Landram, 5 Bush, 330, the Court say:

"One who procures the passage of an act, or afterwards sanctions it, or derives interest or consideration from it, should not be allowed to retain his advantage or keep his consideration, and then repudiate the act as unconstitutional."

The question of estoppel *in pais* as a defense in this action is one outside of the validity of the contract, is one of general law, and the Constitution of Nebraska, however construed or applied, does not defeat such defense.

In this connection consideration should be given to the fact that the parties to a shipping contract no longer make their own contracts. Such a contract is only evidence of the value declared. The Commerce Act fixes their rights and obligations, and neither the law of Nebraska nor an agreement of the parties can modify or impair the provisions thereof. When the respondent tendered his horses for shipment, and declared the value thereof, he became subject to the provisions of the Commerce Act, including the rules, regulations and tariffs of the petitioner, and must be bound thereby, the law of Nebraska to the contrary notwithstanding. The Circuit Court of Appeals seemed to consider only the enforcement of the contract, and disregarded the Commerce Act, the tariffs of the carrier and the wrong doing of the respondent. Petitioner submits that the contract is a secondary consideration, and should not have controlled that Court.

VII.

A FALSE DECLARATION OF VALUE MADE FOR THE PURPOSE OF SECURING A LOWER RATE IS DENOUNCED AS A CRIME BY SECTION TEN OF THE COMMERCE ACT, AND PUBLIC POLICY FORBIDS THE RECOVERY OF DAMAGES IN EXCESS OF THE VALUE DECLARED.

Respondent, having obtained transportation at less than the regular rate by undervaluing his horses, cannot successfully maintain an action on an illegal contract, or recover more than the value on which the charges were based. This should be the law, irrespective of what construction be given the Nebraska Constitution. For twenty years the respondent had been shipping live stock over the lines of the petitioner, and must have had actual knowledge of the basis on which transportation charges were assessed. He is also presumed to know the basis thereof, as stated in the tariffs of the petitioner.

Section 10, of the Interstate Commerce Act, as amended by the Act of March 2, 1889 (25 Statutes at Large, 855), provides as follows:

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom, as a consignor or consignee, any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense is committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the Court."

Section 1 of the Elkins Act (approved February 19, 1903, 32 Statutes at Large, 847) as amended by the Act of June 29, 1906 (34 Statutes at Large, 584), provides:

"And it shall be unlawful for any person, persons, or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier, subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give or solicit, accept or receive any such rebate, concession or discrimination shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be puished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

These acts not only create misdemeanors, but expressly declare certain acts to be unlawful. The Elkins Act, in particular, declares as unlawful the acceptance of a concession whereby property is transported at less than the legal rate. When creating a misdemeanor it inserts the element of knowledge as a requisite thereto. Knowledge, however, is not a necessary element of the transaction designated as unlawful. It must be conceeded that the respondent, by undervaluing his horses, **obtained transportation at less than the regular rate, and received a concession whereby property was transported at a rate less than that named in the tariff.**

In Armour Packing Company vs. United States 209, U. S. 56, this Court decided that the offense had been committed if the transportation had begun, even though not completed. In that case the meaning of the word "device," as it appears in the foregoing acts, is defined as follows:

"And we find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seeks to reach all means and methods by which the unlawful preference or rebate, concession or discrimination is offered, granted, given or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning." (Page 71.)

"It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published." (Page 72.)

For convenient reference the following authorities are cited, in support of the proposition that a cause of action cannot be founded on an illegal transaction.

In Ellison vs. Adams Express Co., 245 Ill. 410, it was decided that if a shipper obtains transportation at less than the regular rate, in violation of the Interstate Commerce Act, the contract of transportation is illegal, and he cannot recover for the loss of his property. The case is in point to the effect that if the shipper has done the act, which is declared unlawful by Section 10 or the Elkins Act, he cannot maintain an action for loss or damage.

The language of that Court is, in part, as follows:

"Courts of justice will not assist parties who have participated in a transaction forbidden by statute to assert rights growing out of it. There can be no right of recovery upon a contract which is against good morals, forbidden by law or opposed to public policy. The law will not lend its aid to enforce a demand having its origin in a breach of the law itself. This principle has been illustrated by a multitude of decisions, and finds expression in the maxim of the Roman law, which is also recognized wherever the common-law prevails: ***Ex turpi causa non oritur actio.***

"Compliance with the requirements of the act by the shipper, as well as the carrier, is essential to its successful operation, and we cannot presume that Congress intended that the contracts forbidden by it should be valid, and should be enforced to the same extent as if there were no prohibition, merely subjecting the offender to the penalty, if detected and prosecuted. We see no reason which excepts this case from the rule that a contract entered into in violation of an express statutory prohibition, cannot be made the basis of an action in a court of justice."

In Haggerty vs. Ice Manufacturing & Storage Company, 143 Mo. 238, the plaintiff placed in cold storage with defendant during the "open season" a large quantity of game, and paid the charges agreed upon for the storage until the "open season" of the next year. When removed, the game was found to be worthless, because of defective refrigeration. On a suit to recover damages, the defense was that the contract was illegal by reason of the game laws of Missouri, which made it a misdemeanor for any person to "purchase, have in his possession or sell" any game during the "closed season." In affirming judgment for defendant on demurrer the Court said:

"Recurring to the petition, it shows on its face that plaintiffs contracted with defendant corporation for the commission of a misdemeanor. It is true the offense is but *malum prohibitum*, but the consequences are the same as if the act were *malum in se*, since in principle there is nothing which should cause the result to differ in the former case from the latter. The law will not stultify itself by promoting on the one hand what it prohibits on the other, and will, for this reason, leave the parties to this suit where it finds them, unsanctioned by its favor and unaided by its process."

In McNeill vs. Railroad Company, 132 N. C. 510, the plaintiff was injured when riding on a pass issued to him in violation of the North Carolina Statute, which was copied from the Federal Commerce Act, and, in denying a recovery, the Court say:

"While the plaintiff was not himself made indictable (as in some states) he knew that the contract was unlawful, and he cannot now come into a court of justice and ask that the court shall give him compensation for damages sustained by the negligent breach of the contract of safe carriage. That presupposes a lawful contract, and he knew that this was an unlawful contract. He and the defendant are in *pari delicto*, and the Court will leave the parties to settle their own controversy over damages for breach of a contract forbidden by law."

"We were cited to many authorities holding ineffectual stipulations upon the back of free passes, exempting the common carrier from liability for injuries sustained by the holder thereof. These authorities are conflicting, 4 Elliott R. R., Section 1608, and can be considered only when the pass is issued in one of the cases permitted by our statute. It has no application to a case like this where the contract of free carriage is illegal and the parties are in *pari delicto*."

In George N. Pierce Co. vs. Wells Fargo & Co., 180, Federal 56 (C. C. A. Second Circuit), the Court in sustaining a contract limiting damages to the value declared, made to secure a lower rate of transportation, say:

"This Court is definitely committed to the proposition that a common carrier may by contract limit the amount of its liability for its negligence. Bachman vs. Clyde Steamship Co., 81 C. C. A., 529;

Hohl vs. Nord Deutscher Lloyd, 90 C. C. A., 166. And we think it would be in the highest degree violative of public policy to permit a shipper who has pecuniarily benefited by the valuation he has deliberately agreed upon, to repudiate his agreement and recover against the carrier on a higher valuation."

The respondent, having obtained transportation at less than the regular rate, violated the terms of the Commerce Act, and should not be permitted directly or indirectly to derive any benefit from his action. The purpose of the Commerce Act was to prevent one shipper from obtaining any advantage over others, who are generally his competitors. If the respondent be permitted to recover more than the value on which his charges were based, he will be given an advantage over other shippers in direct violation of the law. He not only perpetrated a fraud on the petitioner, but committed a crime, and should not be permitted to recover. On the other hand, if the petitioner had voluntarily paid the full value of respondent's horses, it would, in the opinion of the Interstate Commerce Commission, have violated the law and rendered itself liable to a criminal prosecution. The petitioner, therefore, submits that the respondent's cause of action is founded on an illegal transaction, and that to permit him to profit thereby is against good morals and opposed to public policy. This Court should not assist him in his efforts, irrespective of what construction may be placed on the proviso to the Carmack Amendment, or on the Constitution of Nebraska.

The contentions of the petitioner summarized and restated, are as follows:

(1) The Commerce Act, and particularly the

Carmack Amendment thereto, supersedes all state laws prohibiting limitations and exemptions in bills of lading.

(2) Limiting by agreement or by tariff provisions the amount of damages recoverable for the purpose of securing a lower rate, does not exempt a carrier from the liability imposed by the Carmack Amendment.

(3) The proviso to the Carmack Amendment does not continue in force the Constitution of Nebraska, and, thereby, in part, defeat the purpose of that amendment.

(4) If the proviso be construed to continue in force such constitutional provision, the respondent should not recover more than $200.00, for the following reasons:

(a) Adopting the construction of the constitution, given thereto by the Nebraska courts, neither the declaration of value nor the contract limiting the amount of recovery, is a limitation of a carrier's liability at common-law, and, therefore, not invalidated by such constitutional provision.

(b) Assuming that the contract limiting the amount of damages for the purposes of securing a lower rate, is void, by reason of said constitutional provision, nevertheless, the respondent is estopped to deny the truth of his declaration of value, and his contract, limiting damages to the value declared.

(c) Assuming the invalidity of the contract, limiting damages to the value declared, it is against public policy to permit the respondent to recover the full value and to profit by his own fraud and unlawful conduct.

In behalf of the petitioner we respectfully submit that the judgment rendered herein, by reason of the errors assigned and relied upon, should be reversed and the case remanded with directions that a judgment be entered in favor of the respondent for the sum of $200.00 and interest.

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In the Supreme Court of the United States

Chicago, St. Paul, Minneapolis and
Omaha Railway Company,
Petitioner.
vs.
Bud R. Latta,
Respondent.

Number 231

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

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OMAHA PRINTING CO., OMAHA

In the Supreme Court of the United States

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner.
vs.
BUD R. LATTA,
Respondent.

Number 523

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

STATEMENT.

This suit was originally instituted in the District Court of Burt County, Nebraska, by Latta, respondent here, against Chicago, St. Paul, Minneapolis and Omaha Railway Company, petitioner here. The railway company removed the cause to the Circuit Court of the United States for the District of Nebraska, on the ground of a diversity of citizenship. At the first trial the learned Judge of the Circuit reached the conclusion that the railway company was liable to Latta in the sum of $200.00 and no more, and directed a verdict in his favor for that sum with interest. Latta prosecuted error to the Circuit

Court of Appeals for the Eighth Circuit, and on the 26th day of July, 1909, the judgment was reversed, and the cause remanded for a new trial. The second trial resulted in a judgment in Latta's favor for the value of the property destroyed. The Railway Company then prosecuted error to the Circuit Court of Appeals, and the judgment there being affirmed, removed the cause to this Court by certiorari.

Latta's claim as stated in his petition, being that on May 9th, 1907, he delivered to the railway company two horses to be transported over its line of railway and connecting lines to Waterloo, Iowa, and paid the railway company the freight for transportation over its line; that by the negligence of the railway company the animals were burned while being transported over the line of defendant's railway in the state of Nebraska on the same day, alleging the value of the animals to be three thousand dollars, and claiming that sum with interest from the date of their loss.

The answer admits that the railway company is a common carrier; admits the receipt of the horses for transportation from Tekamah, Nebraska, to Waterloo, Iowa, and admits that the animals were burned to death on the ninth day of May, 1907, while in transit and in defendant's possession.

For a separate defense defendant alleged that it was an interstate carrier, subject to the regulation and control of the laws of Congress relative thereto, and that by virtue of these laws it was required to file with the Interstate Commerce Commission and to publish its schedule of rates and charges and all rules and regulations in any manner made by it affecting the charges to be made for the transportation of property. That at the time plaintiff's property was destroyed, it had filed with the Interstate Commerce Commission its schedules of rates and charges, and its rules and regulations applying to the shipment of live stock, and that by its rules and regulations and tables then on file, it was provided as follows:

> "Limitation of Liability. Rates provided on Live Stock will apply on shipments made at owner's risk with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current live stock contract provided by said company, the contract to be first duly executed in manner and form provided therein.
>
> "150 per cent of the rates named in this Tariff will be charged on shipments made without limitation of carrier's liability at common law, and under this status shippers will have the choice of executing and accepting contracts for shipments of live stock with or without limitation of liability, the rates to be made as provided for herein."

Defendant further alleges that under and by virtue of the tariffs of the defendant company and the Western Classification No. 42, duly adopted, filed with the Interstate Commerce Commission and published as required by law, and in effect at the time of the shipment complained of, it was provided, among other things that the

> "Ratings given below are based upon values declared by shippers, not exceeding the following, under contract: Each horse or pony (gelding, mare or stallion), mule or jack, $100.00. Each colt (under one year), $50.00. * * * Where the declared value exceeds the above, an addition of 25 per cent will be made to the rate per 100 lbs. or car for each 100 per cent or fraction thereof, of additional declared value per head; animals exceeding in value $800.00 per head,

or when no value is given, will be taken only by special arrangement. * * *

"Live Stock, L. C. L. (Limited liability under contract, at values stated above), the following estimated weights (exception to rule 1) viz: One horse (gelding or mare), or pony, mule or domestic horned animal (except bulls), N. O. S., 2,000 lbs.; two animals, 3,500 lbs."

The contract of shipment in two papers, marked exhibits "A" and "B" was attached to the railway company's answer and made a part thereof.

Plaintiff's reply admits that the tariff and schedules of rates in force at the date the shipment was made, were on file in the office of the Interstate Commerce Commission of the United States, but alleges that the contract of carriage in this case was made within the State of Nebraska, and subject to the laws thereof, and that insofar as the same sought to limit the liability of the defendant for the loss of said animals while in transit, it was wholly void, and denies the right or duty of the defendant to file with the Interstate Commerce Commission any rule or regulation in violation of law, or any contract containing an unlawful limitation of its liability.

There are no disputed facts. The value of the animals, their loss, and the negligence of the carrier producing that result, the limitation of liability contained in the contract of shipment, as well as the fact that the tariffs containing this limitation had been filed with the Interstate Commerce Commission and published prior to the date of the shipment, are all conceded.

ARGUMENT.

Two questions are presented by the record in this case:

First: Whether or not the provision of the Constitution of the State of Nebraska prohibiting common carriers from in any wise limiting their liability on account of loss of goods enroute by a contract of shipment with the consignor, is superseded and rendered nugatory by an act of the Congress of the United States, approved June 29th, 1906, being an act entitled, "An Act to amend an Act entitled, 'An Act to regulate commerce,' approved February 4th, 1887, and also Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission."

Second: Whether or not a common carrier may lawfully limit its liability for the loss of goods *enroute* by a contract in writing with the consignor, made prior to the shipment under the provisions of the aforesaid Act of the Congress, approved June 29th, 1906.

The Court of Appeals for the Eighth Circuit determined that the Act of Congress referred to did not render nugatory the provision of the Constitution of the State of Nebraska, declaring invalid limitations upon liability by the carrier of the character embodied in the contract, and relied upon by the railway company in this case; that the right on the part of the shipper to recover the full value of property lost or destroyed by the negligence of the carrier, which he had under the law of Nebraska, the place where the contract of shipment was made, was not taken away by the legislation of Congress touching the subject, but was expressly preserved to him. This conclusion obviated the necessity of determining the second question.

THE AMENDMENT TO THE INTERSTATE COMMERCE ACT MADE JUNE 29TH, 1906, HAS NOT SUPERSEDED AND RENDERED NUGATORY THE CONSTITUTIONAL PROVISION OF NEBRASKA, IMPOSING LIABILITY FOR PROPERTY DESTROYED IN TRANSIT THROUGH THE NEGLIGENCE OF THE CARRIER.

The contention, that the law of the place where this contract was made (if the State rule be enforced) makes invalid the limitation under which the carrier claims, will not be disputed. On the other hand, we concede the superior authority of Congress over the entire subject of Interstate Commerce, including the rights and duties of the parties respecting contracts of carriers from one state to another. We concede, that if there be a conflict between the state regulation and the national regulation, the state rule must give way to the superior controlling power, and it may well be that there are cases where Congressional legislation touching some branch of Interstate Commerce is so full, complete, specific, and ample, that there is no room for the operation of state legislation upon the same subject. We submit that the true rule is that before an Act of Congress relating to Interstate Commerce can be held to supersede and render nugatory existing and otherwise valid state regulations relating to the same subject, it must appear either that the Federal Statute is exclusive in that it covers the whole subject and leaves no room for the operation and enforcement of any other rule, or that the rule declared by it is in conflict with the state regulation so that the two cannot stand together.

Undoubtedly a state enactment that exempted the carrier from liability, either while the property was upon its own lines or in the custody of a connecting carrier to whom the contracting carrier had delivered it for the purpose of being forwarded to its destination, would have been superseded and rendered nugatory by the federal enactment under consideration, for the two would have been in conflict and the federal rule must control. But a state regulation or rule imposing liability or prescribing duties not in conflict with the act of June 29, 1906, and otherwise valid, would not be rendered invalid by the action of the Congress.

In the case of Hart vs. Pennsylvania Railway Company (112 U. S. 330) this court held that in the absence of constitutional or statutory inhibitions at the common law, the carrier might limit his liability by a contract of the kind under consideration here. In Railway Company vs. Solan (169 U. S. 133) the contract of shipment was made in Iowa, the Statute of Iowa prohibiting a limitation of liability of this character. In upholding that Statute and the recovery under it, this Court said:

> "A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the law of the state, for acts of nonfeasance or misfeasance committed within its limtis. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and punish. The rules prescribed for the construction of railroads and for their management and

> operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control in some degree, the conduct and the liability of those engaged in such commerce. So long as congress has not legislated upon the particular subject they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. * * * The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

In Pennsylvania Railway Company vs. Hughes (191 U. S. 477) this Court had before it a case in which the Supreme Court of Pennsylvania had placed a different construction upon the common law than that adopted by this Court in Hart vs. Pennsylvania Railway Company, *supra*, and had declared that in the absence of constitutional or statutory inhibition the limitation was void at the common law. This Court, vindicating the right of the highest court in the State of Pennsylvania to determine for itself in a case before it what the rule of the common law in that State might be, quoted with approval the excerpt from the opinion in Railway Company vs. Solan, *supra*, given above, and said:

> "It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that state. But the principle recognized is that, in the absence of Congressional legislation upon the subject, a state may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.
>
> We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce, in the absence of Congressional action providing a different measure of liability when contracts such as the one now before us are made in relation to interstate carriage."

These decisions were made prior to the enactment of the amendment to the Interstate Commerce Act relied upon here, and it must be conceded that that amendment relates to the subject under discussion, and if it were true that the Act under consideration was designed to, or did, authorize the carrier to limit its liability, and thereby created a right it might exercise in the making of contracts for carriage not in harmony with the rule of the common law as the State Courts construe that law in the State of Pennsylvania, or the Statute of Iowa as construed by her Courts, or the constitutional provision of Nebraska as construed by its highest Court, then the carrier may insist upon the right thus granted to it by the act of Congress, and State construction, laws and Statutes must give way before it. But the effort to find anything in the Interstate Commerce Act authorizing a railroad company to limit its liability in a case of this kind will not be successful. On the contrary the Federal provision imposes liability and inhibits exemptions therefrom, and touches the subject in no other way except to preserve to the shipper such remedies and rights of action as he had under existing laws prior to the Federal enactment.

Conceding as the petitioner must in this case that the Federal enactment upon which it relies does not expressly or by implication grant it any exemption from liability, it may not reasonably urge that the State enactment is at all in conflict with the Federal Statute. There is no better reason for the claim that the Federal enactment is exclusive. The Federal Statute imposes liability and denies the right to contract for exemption therefrom. Assuming, as the petitioner must, that there is a difference between the Nebraska rule of liability and inhibition of exemption therefrom as declared by its Constitution, and the Act of Congress under consideration, the utmost that can be said for the difference, is that the State has made a rule "not in any just sense a regulation of Commerce, the object and effect of which is to make it more certain that railroad companies will perform duties devolving upon them by virtue of their employment as common carriers," and the Federal government has made a rule in entire harmony with the State rule so far as it goes, but not going as far in that direction as the State rule has gone, although it must be conceded, that the application of the state rule to contracts made in the state of Nebraska will not at all interfere with the operation and enforcement of the Federal rule everywhere.

Suppose Congress, in the exercise of its undoubted power over the subject of Interstate Commerce, with the design of conserving the safety of life and property, should enact a law providing that freight trains in the Interstate service should not be moved at a higher rate of speed than forty miles per hour. The State of Nebraska should declare by Statute that all freight trains being moved through incorporated cities and towns in the State should not exceed a speed of twelve miles per hour. The carrier, charged with the violation of the State law, points to the Federal enactment and asserts that Congress has legislated touching the subject, and the police power of the State relating to this matter is thereby destroyed. The answer to this contention would be, of course, that the Federal Statute placed a limit upon the speed of freight trains, but did not create any right to operate them at an excessive or dangerous rate of speed anywhere, and the Court would look at the State law to see whether or not it conflicted with the Federal Statute, and also to ascertain whether or not its enforcement placed an unreasonable, unnecessary or unjust burden upon Interstate Commerce; neither of these conditions existing, the State Statute would be as valid, operative and enforcible as though Congress had never legislated upon the subject of the speed of freight trains at all.

The rule for which we contend was applied by this Court in the case of Compagne Francaise De Navigation A Vapeur vs. State Board of Health, Louisiana (186 U. S. 379). In that case the Federal government had legislated touching upon the subject of the admission, inspection and quarantine of emigrants entering this country, and the question was whether or not the Federal authority superseded State Authority at the ports of entry. The holding was that it did not, and while the Court concluded that the language of the Federal Act itself made the local regulations ancillary and subject to the Federal law, the rule, that the application by Congressional enactment of Federal Authority over a subject committed to the care of the general government by the Federal Constitution, does not at all interfere with the exercise by the State under the police power of its authority touching the same subject, so long as this exercise of power is reasonable, and does not interfere with the full and efficient operation of the Federal rule is fairly deducible from the opinion in that case.

In this case it is plain that the State rule does not interfere with the full, efficient and complete operation of the rule prescribed by Congress. That the State rule involves a reasonable and proper exercise of the police power of the State, and in no wise interferes with or imposes an unjust burden upon Interstate Commerce, and finally that Congress, by the very Act now claimed to be exclusive, intended to, and did, expressly preserve to the shipper the right and remedy vindicated by the judgment in this case.

THE ACT OF CONGRESS, ITSELF, FORBIDS THE LIMITATION OF LIABILITY BY THE CARRIER.

Assuming for argument's sake that the Interstate Commerce Act has stricken down all State rules and regulations, and that the contractual relations of the shipper and carrier, no matter where their contract may be made, is to be measured by the Federal rule, it still follows that the judgment in this case must be affirmed. The Federal Statute imposes upon the carrier absolute liability for the loss, damage or injury to property caused by the carrier, and explicitly provides that no contract or receipt shall exempt the carrier from such liability. The liability thus imposed covers the entire loss in this case, and the actual value of the property destroyed. The carrier seeks to escape this liability by pointing to a shipper's receipt in which it is agreed that in the event of loss the owner's liability shall be limited to $100.00 for each animal destroyed. It is not claimed or pretended that the valuation fixed in this receipt was designed to represent, or be, or thought by either party of the contract to represent, the true value of the horses shipped. It was designed by the carrier, and so designated by it, as a limit upon its liability, and intended to enable it to escape the application and enforcement of the law under consideration. We concede that if the shipper represents his property to be of a certain value, and by this representation induces the carrier to move it at a lower rate than it would have been moved had the carrier been truthfully advised by the shipper of its true value, or in the event of the shipment of a closed package, of the contents of the parcel shipped, the carrier may well claim that the shipper is estopped from asserting the property lost to have been of greater value when making its claim against the carrier. But that is not this case. In the case suggested, the carrier must plead and prove the false representation as to value and its reliance thereon, and can not escape liability by the mere introduction of a shipper's receipt or contract limiting liability in the event of loss to a specific sum, for that is to give to the contract or receipt a force and effect that the law expressly provides it shall not have.

It is not pretended that the valuation of one hundred dollars each, placed upon these animals in the shipping contract was the result of any valuation made by the shipper at the time the contract of carriage was made. It appears that this valuation was made with respect to all horses that might be shipped over defendant's line of railroad and filed with the Interstate Commerce Commission prior to the time when plaintiff's contract of carriage was entered into, and by the terms of the contract itself as pleaded by defendant in this case, defined and treated as a "limitation of liability"—the very thing the law forbids. And we think the soundness of our contention in this behalf is thoroughly demonstrated by the reasoning of the Interstate Commerce Commission and the authorities cited in the opinion of Mr. Commissioner Lane in The Matter of Release Rates, Volume 13, Int. Com. Rep., page 550:

> "If the specified amount does not purport to be an agreed valuation, but represents an attempt on the part of the carrier to limit the amount of recovery to a fixed sum, irrespective of the actual value, the stipulation is void as against loss due to the carrier's negligence or other misconduct."
>
> "If the specified amount, while purporting to be

> an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount, liability for the full value can not be escaped in event of loss due to negligence."

That rule applied to the facts in this case, does not exempt defendant from liability for the full value of the animals destroyed. It must be conceded that the value named in the contract was out of all proportion to the true value, that the valuations provided for in the tariff filed with the Interstate Commerce Commission by defendant and used in the case at bar, were intended and designed to limit the liability or loss on the part of defendant to a specific sum, regardless of the true value of the property lost.

Leaving all other considerations aside and undertaking to construe the amendment to the Commerce Act so as to ascertain its true meaning as intended by Congress, we find that it in terms imposes upon the carrier the duty of issuing a receipt or bill of lading for property delivered for transportation, declares the carrier "shall be liable * * * for any loss, damage or injury of such property caused by it," and further provides that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed." At the time this Act was passed this court, and a number of other of the highest courts of the respective states, were committed to the doctrine of the Hart case, that is, that an agreed valuation of the property shipped inserted in the contract or receipt and signed by the shipper would limit his recovery in the event of loss to the value so fixed. A number of courts of last resort in the several states did not so construe the rights of the parties at the common law, and held that limitation upon the liability of the carrier could not be lawfully made in the manner suggested, the making of a contract of that character being held inimical to public policy. In some of the states, statutory and constitutional provisions had been adopted prohibiting agreements whereby the carrier would not be required to pay the full value of property destroyed. Under these circumstances we submit that the reasonable conclusion respecting the act before us, is that Congress intended to change the common law rule as declared in the Hart case, and make it impossible for the carrier to limit its liability by a contract with the shipper, and that this meaning and effect should be given to the Statute by the Court.

The Supreme Court of Iowa, in Winn vs. The American Express Company (128 N. W. 663) was confronted with the contention that the Federal law had superseded the State Statute, and that the true construction of the Federal law was different from the construction that court had given the State Statute. It disposed of that contention as follows:

> "We come now to the last point in the case, being involved in that part of the answer numbered 4. The defendant sought to limit its liability to the sum of $50; such amount being the basis of value upon which transportation charges were fixed. It is contended that the plaintiff was guilty of misrepresentation as to such value and that he should be precluded thereby from proving any greater value. In other words, it is contended that the agreement limiting the liability of the carrier to the sum of $50 should be enforced. The point is clearly covered by section 2074 of our Code, which is as follows: "No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the

liability of a common carrier, or carrier of passengers, which would exist had not contract, receipt, rule or regulation been made or entered into." We have held heretofore that such an agreement is not only covered by the terms of the above statute, but that it was void at common law, as against public policy. Solan v. C., M. & St. P. Ry. Co., 95 Iowa 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. Rep. 430, Hart v. C. & N. W. Ry. Co., 69 Iowa 485, 29 N. W. 597; Lucas v. B., C. R. & N. Ry. Co., 112 Iowa 594, 84 N. W. 673.

It is urged, however, that the cited cases were all decided prior to the enactment of the interstate commerce law and that they are no longer applicable. But this contention avails little to the defendant, because we find nothing in the interstate commerce law which supersedes in any manner the rule of liability which may obtain in the different states. The following excerpt from the interstate commerce act comprises all that is contained therein that is in any degree pertinent to this question: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury, to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." On the face of it this provision is rather confirmatory than otherwise of the rule which obtains in this state. That such rule presents no conflict with the act seems to have been held in Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268.

Again, in the case of Cramer vs. Chicago, Rock Island & Pacific Ry. Company, decided by the Supreme Court of Iowa November 20th, 1911, and reported in Volume 133, Northwestern Reporter, 387, the question was again presented and the opinion of the Court, by Deemer, Judge, elaborately reviews the entire subject. After quoting the amendment to Section 20 of the Interstate Commerce Act, the Court says:

> "Again section 9 of the interstate commerce act provides: 'That any person, or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such carrier may be liable under the provisions of this act, in any District Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods herein provided for he or they will adopt.'
>
> It seems to us that the amendment just quoted makes the initial carrier liable for all damages sustained, and that this liability cannot be affected by any contract, rule, or obligation. We concede, however, that these amendments are not controlling upon the proposition here involved, and we cite them to show that, in so far as Congress had acted, prior to June 18, 1910, there was no attempt to vitalize such contracts as are here involved. We do not understand that the Interstate Commerce Commission approves and adopts all rates and conditions contained

in any schedule of rates filed by a common carrier. At the time when the shipment in question was made, the Interstate Commerce Commission had no authority to fix rates for future shipments. It did have power, however, to determine upon the reasonableness of rates, when that question was brought before it. Interstate Com. v. Ala. R. R., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414, I. S. C. C. v. Cin. R. R., 167, U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. But it had no power to issue general orders in relation to carriers. Tex. R. R. v. I. S. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.

From the mere fact that the defendant company filed its schedule of rates as required by law, no inference arises that the Commission agreed to these rates, or to all the proposed conditions of shipment. This rule is imperative, as we think, when applied to contracts or conditions against public policy, or contrary to the general law. It is said that the Commission has given its sanction to valuation clauses, such as the one relied upon in various cases; but it is not contended that it has ever approved the one relied upon by appellant, and there is reason to believe that it will not give its sanction to such a valuation as is relied upon in the instant case. That valuation is arbitrary, is one fixed by the carrier on its own motion, and gives the shipper no other option than to agree upon a valuation, not exceeding $10 per head, or pay a higher rate, which is not shown by the answer to be reasonable. Generally speaking, those courts which have approved limitations as to the amount of recovery in case of loss have done so upon the theory that there has been a bona fide agreed valuation between the shipper and carrier, based upon the rate to be charged, and not a mere arbitrary limitation to a stipulated amount. See U. S. Co. v. Backman, 28 Ohio St. 144; Hart v. Railroad, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Kansas R. R. v.

Simpson, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; Moulton v. St. Paul R. R., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; Georgia R. R. v. Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197.

An eminent text-writer has stated the rule, as we understand it, in the following language: 'Where, however, the valuation is an arbitrary one, made by the carrier, or the latter thus seeks to escape liability for its own negligence beyond the amount fixed, and such amount is obviously much less than the true value of the goods, a different question arises. An arbitrary and unreasonable limitation, inserted in a bill of lading by the carrier, without any request or notice to the shipper, and without consideration or an opportunity to obtain a lower rate of freight in consideration thereof, is not binding upon the shipper. Some of the authorities cited in support of this proposition go still further, and seem to hold that the valuation must be made by the shipper; but there is conflict upon this point, and it is held in a leading case, and others which follow it, that it is immaterial whether the shipper fixes the value or not, so long as he agrees to it by acceptng the bill of lading without objection. The most stubborn conflict among the authorities, however, is upon the question of the validity and effect of such a valuation and limitation where the carrier is guilty of negligence. But we believe that most of the apparently conflicting decisions can be reconciled in accordance with the following rules: (1) A bona fide contract, fairly made in advance, upon sufficient consideration, fixing the value of the property, or the rule for ascertaining its value in case of loss or injury, even if the carrier is guilty of negligence, is valid and enforceable, and, if based upon a lower rate of freight in proportion to the decreased liability, 'will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation.' (2) A stipulation arbitrarily limiting the amount of recovery, in case of the negligence of the carrier, without regard to the value of the property, is invalid, except perhaps in the few jurisdictions in which a carrier can contract for an exemption from liability for its own negligence. (3) The agreement as to value must be made in good faith, and not forced upon the shipper by unreasonable rates for a higher valuation. (4) A carrier may make reasonable regulations, graduating its compensation according to the value of the property, and requiring a disclosure of such value for the purpose of fixing its compensation, and providing that, in case of the failure of the shipper to disclose the value as required, it shall be deemed not to exceed a certain specified sum. (5) If the shipper, upon inquiry duly made by the carrier as to the value of the goods, gives a false valuation, in order to obtain reduced rates, and deceives the carrier thereby, he will be estopped by his fraud from claiming and recovering any greater amount, in case they are lost or injured.' 4 Elliott on Railroads, Sec. 1510.

But we need not speculate upon this, for it is not contended that the stipulations in question have ever been approved by the Commission. It will be observed that the action is bottomed upon negligence, and that for present puropses it must be assumed that the loss which plaintiff suffered was due to defendant's negligence. It must also be assumed that the carrier arbitrarily fixed the maximum value of the animals shipped, and that the shipper had no option but to accept this arbitrary valuation, or to pay a higher rate. The reasonableness and justness of this higher rate is not shown, but assumed without any showing of record as to what it is. Consideration should also be given to the fact that it is not an action in which any complaint is made of the rate as fixed. The gist of the complaint is defendant's failure to perform its common-law and statutory duty; that is to say, negligence. Fundamentally defendant is relying upon a contract limiting its liability for that negligence, and in order to do so it must present such a contract as the courts will approve. The principal case relied upon by appellant is far from being conclusive. The case was an action to recover for alleged overcharge and for exactions which were alleged to be unreasonable, and the opinion written by the present Chief Justice is far from controlling on the proposition now before us. That case is Tex. R. R. Co. v. Abilene Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. That decision, it seems to us, goes no farther than to hold that a shipper cannot maintain an action to obtain relief from an alleged unreasonable freight rate, exacted from him for an interstate shipment, where such rate has been filed with the Interstate Commerce Commission, and promulgated as provided by the act to regulate commerce. The question in the instant case is not one primarily of rates, but of the right of the carrier to limit its liability for negligence. Of course, it is permissible to draw analogies from the cited case; but there is nothing in the decision which holds to the doctrine that the Interstate Commerce Commission has, either expressly or impliedly, ratified and approved such contracts as are here involved. Our conclusions find support in Latta v. C., St. P., M. & O. R. R., 172 Fed. 850, 97 C. C. A. 198.

It is argued, however, that our construction of the law affords a ready means whereby rebates may be offered to shippers, and that for this reason it should not be adopted. This argument, while plausible, is not persuasive. Of course, there are many devices which might be adopted in order to avoid the law against rebates and discriminations; but it seems to us that in upholding the stipulations relied upon in this case we would point the way to unlawful discriminations in rates quite as effectively as by denying the validity thereof. It must be assumed, in solving the question now before us, that plaintiff suffered a loss to the extent claimed, and that defendant is relying upon a contract limiting its liability for such loss. No rebate is being granted to the shipper, either directly or inferentially. Compensation for his loss is all he seeks, and is all that has been awarded. No discrimination was intended in granting him the rate which was charged, and, even, if that had been the intent, we doubt whether the defendant is in position to avail itself of such discrimination, in an action against it for negligence. Even if fraud on the part of the shipper is charged, it is unavailing under the rule announced in Winn v. Am. Exp. Co., supra. See, also, Betus v. Railroad, 129 N. W. 962. It is not alleged that the rate given the plaintiff was discriminatory in character, or that it was unreasonable. The sole defense is that he agreed to a limitation upon the carrier's liability in case of injury to the property, even if such injuries were due to negligence; and it is argued that such agreement is good, because the Interstate Commerce Commission approved thereof, or so treated the schedule filed as to ratify, not only the rate, but all proposed stipulations and agreements contained in the contracts entered into between the carrier and the shipper, or embodied in the bill of lading issued by the railroad company. There is, as we think, no merit in the contention that a rebate or concession has been granted to the shipper. Cases relied upon by appellant in support of its present contention are not in point.

Suggestion is made that our construction of the law gives to plaintiff a less rate than that required by law, due to the filing of defendant's schedule of rates. For some purposes, this may be assumed; but it does not follow that the penalty is a forfeiture on the part of the plaintiff of all damages sustained by him, or necessarily limits the amount of recovery. The thought is of course, worthy of consideration in arriving at a proper decision as to the effect to be given the stipulations in question, but it is not controlling. After all is said, we think the inquiry is limited to a question of law, independent of the schedules filed. If the stipulations relied upon are invalid, either by statute or at common law, and if the state has power to enact such a statute as section 2074 of our Code, then it must be assumed that the Interstate Commerce Commission did not approve of the conditions or limitations contained in the defendant's bill of lading or shipping contracts. Congress had not assumed to legislate upon the subject of the legality of these contracts, and the field is open to state action, unless the interstate commerce act is to be so construed as to forbid all action by the states with reference to the validity of contracts entered into by shippers and carriers within their jurisdiction. We do not believe that this construction should be placed upon the interstate commerce act, and it is certainly true that the Supreme Court of the United States has not yet announced such a doctrine. That the Congress of the United States might do so in all cases of interstate shipment we have no doubt; but until it does the matter is unquestionably left to state control. Finally, it must be remembered that the question of rates for an interstate shipment is only incidentally involved; that the action is not to recover an overcharge, or to have a readjustment of rates; that the contract provisions relied upon have never been expressly approved by Congress or the Interstate Commerce Commission; that the question is one of general law, and goes simply to the inquiry, Are the conditions and stipulations relied upon valid limitations upon plaintiff's right to recover for negligence? We might well have treated the question as settled by Winn v. Express Co., supra, but the argument now presented contains some new phases, which we thought well to consider, and the propositions decided in the Winn Case have been elaborated, in order to justify the announcement made. We are willing to concede the force of appellant's argument, and to agree that the question is by no means free from doubt; but our former decisions are such that, to be consistent, we must hold the stipulations limiting liability invalid, contrary to our statute, and opposed to sound public policy. It may be that there should be a general rule, applicable to all interstate shipments, holding such contracts as are relied upon either valid or invalid, in order that the extent of liability may not depend upon the place of the contract; but this suggestion has no doubt occurred to members of Congress, and with full knowledge of the conflict in court decisions they have not seen fit to legislate upon the subject. The matter is still open to state action or inaction, and the courts in the several jurisdictions must either uphold or deny the legal efficacy of contracts limiting liability; the conclusion being dependent upon state statutes, or upon the view entertained by the particular court of the public policy of such contracts. We are fully committed to the doctrine that such contracts are invalid, and we see no reason for holding that this rule has been abrogated by Congress or by the Interstate Commerce Commission."

In conclusion we submit:

First: That the constitutional provision of the State of Nebraska, declaring the contract by means of which respondent seeks to escape liability in this case, utterly void, is still in force and has not been abrogated or its operation interfered with by the Acts of the Congress under consideration.

Second: That the provision of the contract under consideration is inimical to the requirements of the Interstate Commerce Act itself, and respondent could not make, and the Interstate Commerce Commission could not authorize it to make, a valid contract of this nature.

Respectfully submitted,

H. C. Brome,
W. M. Hopewell,
Attorneys for Respondent.

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Office Supreme Court, U. S.
FILED.
SEP 11 1912
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States

October Term, 1911.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,

vs.

BUD H. LATTA,
Respondent.

Number 231.

MOTION TO ADVANCE FOR HEARING.

H. C. BROME,
W. M. HOPEWELL,
Attorneys.

[illegible]

In the Supreme Court of the United States

Chicago, St. Paul, Minneapolis and Omaha Railway Company, *Petitioner,*
vs.
Bud R. Latta, *Respondent.*

Number 523.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

MOTION TO ADVANCE FOR HEARING.

Comes now Bud R. Latta, respondent in the above entitled cause, and moves the Court here that the above entitled cause, being number 523 upon the docket of this Court for the regular October, 1911, term thereof, be advanced for hearing and heard with or immediately after the hearing in the case entitled Chicago, Burlington & Quincy Railway Company, Appellant, vs. H. R. Miller, Appellee, being number

199 upon said docket; for the reason that said two causes involve the same questions, to-wit:

First. Whether or not the provision of the Constitution of the State of Nebraska prohibiting common carriers from in any wise limiting their liability on account of loss of goods *enroute* by a contract of shipment with the consignor, is superseded and rendered nugatory by an act of the Congress of the United States, approved June 29th, 1906, being an act entitled, "An Act to amend an Act entitled, 'An Act to regulate commerce,' approved February 4th, 1887, and also Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission."

Second. Whether or not a common carrier may lawfully limit its liability for the loss of goods *enroute* by a contract in writing with the consignor, made prior to the shipment under the provisions of the aforesaid Act of the Congress, approved June 29th, 1906.

The respondent respectfully shows to the Court that no questions other than those above set forth are involved in said cause: that the questions presented and to be decided in each of said causes are identical and the decision and judgment of this Court in one, must necessarily determine all questions involved in the other.

All of which is respectfully submitted.

BUD R. LATTA, *Respondent.*
By H. C. Brome
W. M. Hopewell.
His Attorneys.

Supreme Court, U. S.
FILED
MAR 4 1912
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States

Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Petitioner.
vs.
Bud R. Latta,
Respondent.

Number [illegible]8

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

H. C. Brome,
W. M. Hopewell,
Attorneys for Respondent.

Omaha Printing Co. Omaha

IN THE SUPREME COURT
OF THE
UNITED STATES

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, *Petitioner,* vs. BUD R. LATTA, *Respondent.*	Number 523

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF OF RESPONDENT.

H. C. BROME,
W. M. HOPEWELL,
Attorneys for Respondent.

This supplemental brief is submitted because the original brief of respondent filed in this case was prepared, served and filed prior to the receipt by counsel for respondent of the brief of petitioner, and is designed to answer such contentions of counsel for petitioner as are not discussed in respondent's original brief.

FIRST.

In the statement of facts in the brief of petitioner, the following statement is made: "Neither the Court nor the jury made any finding that the loss of said animals was caused by the petitioner either negligently or otherwise, and the evidence did not conclusively establish such fact." This statement is emphasized in the brief of petitioner. The original brief of respondent having asserted the loss of the animals, and the negligence of the carrier producing that result, to be undisputed facts, we deem it prudent to direct the attention of the Court to the state of the record touching this subject. The jury did find that the loss of the animals was caused by petitioner's negligence for they returned a general verdict for respondent which necessarily involved this finding. The evidence for respondent at the trial established the fact that the fire originated, or was first discovered, in the roof of the car in which the animals were being transported, it being the second car back from the engine. That the train was moving at the time the fire was discovered, that there was no other fire in the neighborhood, except the fire used to generate steam in the engine. That when the fire was discovered the train was stopped, and respondent, who was riding in the caboose of the train, went forward to the burning car; that at that time the animals were uninjured, and respondent could have safely removed them from the car without injury, and attempted to do so; that the conductor in charge of the train refused to permit this to be done, but immediately uncoupled the car from the rest of the train, moved it to the nearest station one and one-half miles distant, and that when the car reached the station the fire had destroyed the animals.

The settled rule in Nebraska, and in the Federal Court in the Eighth Circuit, for many years has been, and is, that proof that property has been destroyed by sparks emitted by a locomotive creates a presumption of negligence on the part of the Railroad Company or its employees, either in the construction or handling of the engine, or in failing to keep it in proper repair.

McCullen vs. C. & N. W. Railroad Co., 101 Federal Reporter, 66.

U. P. Railroad Co. vs. Kellar, 36 Nebr., 189.

Rogers vs. K. C. & O. Railroad Co., 52 Nebr., 86.

Petitioner offered no evidence touching these matters at the trial, made no claim that the trial court should submit any issue of fact respecting the loss of the animals or the cause thereof to the jury, made no complaint in the Court of Appeals respecting the action of the trial court in that regard, and the specifications of error in this court do not present the question for review here. Under these circumstances the result here must be controlled by the conclusion reached respecting the validity of the

Limitation of Liability clause of the shipping contract.

SECOND.

The case of Texas & Pacific Ry. vs. Abilene Cotton Oil Co., 204 U. S. 42, is suggested in the brief of petitioner to present a situation similar to that in the case at bar. The provision under consideration there was as follows:

> "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In that case the Court found that the Congress had delegated to the Interstate Commerce Commission the duty of determining whether or not an interstate rate for the transportation of freight was a reasonable rate, and that the exercise of this power by that tribunal was inconsistent with the exercise of the same power by every court in the land, and that the proviso could not operate to retain for the shipper the right to invoke the judgment of a court in the first instance as to the reasonableness of the rate he was required to pay. And if it were true that in this case the Act of Congress had reserved to the Commission the duty of determining what amount of damages the carrier should pay in the event of the loss of the article being transported through the negligence of the carrier, or the rule that should be adopted in measuring the shipper's damage in the event of such loss, there would be merit in petitioner's contention, but no such case is presented.

The power of the courts to determine whether or not an interstate shipment has been lost through the negligence of the carrier, the measure of the shipper's damage in that event, and in a proper proceeding in an ordinary suit at law by its judgment to ascertain, determine and enforce the shipper's rights in that behalf, is not at all impaired by the provisions of the Interstate Commerce Act. That tribunal has the exclusive power to determine what charge shall be made by the carrier for a specific service, and to order reparation if an excessive charge has been made, but it has not power to determine whether or not a spcific item of freight has been lost in transit through the negligence of the carrier, and to order reparation to the shipper for the loss so sustained. Nor has it the power to make a rule that shall measure the damages the shipper is entitled to recover in that event.

The duty of determining whether or not respondent's horses had been lost through the negligence of the carriers, and what, in that event should be the measure of his damages, devolved upon the court, and respondent invoked the jurisdiction of a competent tribunal in that behalf. The court determined that by the law of the place where the contract was made, the carrier was liable for all the loss he had sustained, and while conceding to the Congress plenary power to authorize a limitation of liability with respect to interstate contracts of carriage, concluded that Congress had not undertaken to authorize any limitation of liability, but on the contrary had forbidden such limitations, and expressly declared that local laws of that character should remain in force and be given effect by the courts.

The contention of petitioner is that a Federal Statute, forbidding limitations upon liability by contract, shall be construed by this court as authorizing the very thing it inhibits. If it be true, as we contend it is, that the Federal Statute forbids any and all limitations of this character, then it may well be said that the Federal Statute occupies the whole field, and that there is no room for the operation of the local law. If limitations of this character are not forbidden by the Federal Statute, they are forbidden by the law of Nebraska, and that law does not conflict with, or interfere with, the operation of the Interstate Commerce Act in any manner, and in either event, the result in this case is the same. And the opinions in Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Company, *supra;* and the later cases of Atlantic Coast Line Railroad Company vs. Riverside Mills, decided by this court January 3rd, 1911; Western Union Telegraph Company vs. Commercial Milling Company, decided November 28th, 1910; Robinson vs. Baltimore & Ohio Railroad Company, decided January 9th, 1912; Southern Railway Company vs. Reed, decided January 9th, 1912; Northern Pacific Railway Company vs. State of Washington, decided January 9th, 1912; Mondou vs. New York, N. H. & R. I. Railroad Company, decided January 15th, 1912, are all, as we think, in harmony with the contention here made on behalf of respondent.

THIRD.

The claim that the provision of the contract to the effect that "It is agreed that the value of the animals shipped does not exceed of their kind per head the above named valuation" was equivalent to a representation by the shipper to the carrier that this sum was the actual value of the animals shipped, that the carrier relied upon this representation, and was thereby misled, and the shipper ought to be estopped thereby, finds no support in the pleadings or proof. The record discloses the fact that neither the shipper or carrier understood or supposed that any effort had been made by either to ascertain the actual value of the animals shipped. If the animals were only worth $15.00 per head the shipper could only recover that sum in the event of their loss, and the question of actual values was specifically eliminated from consideration by the terms of the contract itself.

The tariff was not discriminatory as published, it was open to everybody. The animal might be worth $10,000, and the carrier well advised of that fact, but the owner, as of right, is entitled upon executing the contract to have the shipment made at the tariff rate.

From whatever angle this controversy may be viewed, the result is the same—the carrier is seeking to asert its power by contract to limit its liability. Whatever the common law may have been, The State of Nebraska by its Constitution, and the Congress by its enactment, have undertaken to inhibit the exercise of this power, and we submit the effort has been successful.

Respectfully submitted,
W. M. Hopewell,
H. C. Brome,
Attorneys for Respondent.

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SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1911

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Petitioner,
vs.
BUD R. LATTA,
Respondent.

No. 231.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

Reply Brief of Petitioner

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SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1911

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Petitioner,
vs.
BUD R. LATTA,
Respondent.

No. 523

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

In reply to the brief filed by the respondent, attention is directed to the fact that this case is here on **certiorari** to the United States Circuit Court of Appeals, and is governed by the law of that jurisdiction. In this particular it differs from the cases of Penn. R. Co. vs. Hughes, 191 U. S. 477, and Chicago, etc., R. Co. vs. Solan, 169 U. S. 133, which came to this court on error to the Supreme Court of the state. It follows that, as to all questions of commercial law or general jurisdiction involved herein, this court is free to follow the law of this jurisdiction.

I.

Under the Tariffs and Classification, the respondent had the right to ship at a rate without any conditions attached thereto, or at a rate conditioned on the carrier assuming a liability only to the extent of an agreed value.

The material parts of the tariffs and classification applicable to the shipment in controversy, reprinted from the record, are as follows:

> "Limitation of Liability—Rates provided on livestock will apply on shipments made at owner's risk, with limitation of liability on the part of the railroad company as common carrier, under the terms and conditions of the current livestock contract provided by said company, the contract to be first duly executed in manner and form provided therein.
>
> "One hundred and fifty per cent of the rates named in this tariff will be charged on shipments made without limitation of carrier's liability at common law, and under this status shippers will have the choice of executing and accepting contracts for shipments of livestock with or without limitation of liability, the rates to be made as provided for herein." (Record, Page 6.)
>
> "Livestock. Ratings given below are based upon values declared by shippers, not exceeding the following, under contract:
>
> Each horse * * * $100.00
> Each colt (under 1 year) * * 50.00
> * * *
>
> Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 ℔s * * for each 100 per cent, or fraction thereof, of additional declared value per head; animals exceeding in value $800.00 per head, or when no value is given, will be taken only by special arrangement. * * *

(2) Livestock L. C. L. (limited liability under contract, at values stated above), the following estimated weights: * *

(3) One horse, * * * 2,000 pounds..1

* * *

(8) Colts under one year, 750 pounds each ....1½"

* * *

(See Record, Pages 40 and 41.)

In explanation of the above, the letters L. C. L. mean less than carload lots, and the figures "1" and "1½" mean first-class and one and one-half times first-class.

The distance tariff applicable to the foregoing classification, prescribed a rate of 30 cents per hundred pounds on horses classed as first-class, and 45 cents per hundred pounds on colts classed as 1½ times first-class, for the carriage of horses and colts from Tekamah, Nebraska, to Council Bluffs, Iowa. (Record, Pages 7 and 41.)

The minimum rates applicable to the transportation of horses and colts, as shown by the foregoing tariffs and classification, were based on horses valued at $100.00 per head and on colts valued at $50.00 per head, conditioned on the carrier assuming liability only to the extent of such value. When the value of the animals was in excess of such values, the rates were graduated according to such excess value. In case the shipper did not value his animals, the tariff extended to him a rate 150 per cent higher than the minimum rate, based on the minimum value and conditioned as above.

In other words, when the respondent tendered his horse and colt for transportation, he had the alternative of rates based on their value, conditioned on the carrier assuming liability only to the extent of such value, or of rates without any condition attached thereto. If his horses had been of the value of $100.00 each, he could have declared that value conditioned as above, and thereby secured the minimum rate on horses, which was 30 cents per hundred pounds, from Tekamah to Council Bluffs. If they had been of greater value than $100.00 per head, he could have declared the higher value, conditioned as above, and thereby secured a rate 25 per cent higher than the minimum rate for each 100 per cent of additional value. If he had declared the value at $300.00 per head, his rate would have been 45 cents per hundred pounds, instead of 30 cents. If he had preferred to place no value on his horses and to ship them without any limitation of liability on the part of the carrier, his rate would have been 150 per cent higher than the minimum rate based on the minimum value. If he had done so, his rate on the horse would have been 45 cents per hundred pounds and on the colt 67½ cents.

The livestock contract and shipping order, executed by the respondent, are supplemental to the tariffs and classification, and should be construed in connection therewith. The material parts of the contract are as follows:

> "The rates provided in the tariffs of this company are based upon the following value of animals named, to-wit:
>
> One hundred dollars per head on each horse.
>
> * * *
>
> And if this shipment is moved at the tariff rate it is agreed that the value of the animals shipped does not exceed, of their kind, per head the above named valuation.
>
> If the shipper declares a value in excess of the above valuation, and this shipment is moved at a rate based thereon, it is agreed

> that the value of the animals shipped does not exceed such declared valuation, which is as follows:
>
> Each horse * * per head....$100.00
> Each ox or bull, per head.... ......
> Each calf or hog, per head... ......
> * * *
>
> The shipment covered by this contract is accepted and forwarded subject to the agreed valuation, and the rate of freight is based on the condition that the railway company assumes liability only to the extent of such agreed valuation.
>
> When the declared value exceeds the valuation on which the tariff rate is charged, an addition of 25 per cent will be made to such rate for each 00 per cent, or fraction thereof; additional declared value per head up to $800.00 per head." (Record, pages 30 and 31.)

The original contract has been duly certified to this court, and attention is directed thereto. In the blank left for the insertion of the value when the same was in excess of one hundred dollars, the figures "$100.00" were inserted. If the respondent desired to ship at an agreed valuation of one hundred dollars, it was unnecessary to insert these figures in this blank. The one hundred dollar valuation was the basis of the lowest rate, and was printed in the contract. For the apparent purpose of making assurance doubly sure that the agreed value was one hundred dollars, and not a value in excess thereof, the figures "$100.00" were written in this blank. The record is silent as to who wrote these figures or when they were written. The presumption, however, is that the question of value was considered when the contract was executed, and that the respondent either wrote in these figures or requested them to be written in.

or had knowledge of the fact that they were made a part of his contract:

The material parts of the shipping order are as follows:

> "The shipper may elect to accept the conditions printed on the back hereof, and as contained in the Bill of Lading of which this Shipping Order is a part, or may, as provided below, require the carriage of property at 'Carrier's risk,' * * * O Rel to Cont val. * * * B. R. Latta, Shipper. * * *
>
> If the shipper elects not to accept the said tariff rates and conditions, he should so notify the agent of the receiving carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to the conditions of the Bill of Lading, of which this order is a part, in order to secure the reduced rates thereon. Property carried not subject to the conditions of the Bill of Lading will be at the carrier's liability, limited only as provided by common law, and by the laws of the United States, and of the several states insofar as they apply. Property thus carried will be charged at the higher rating provided in current tariffs and classifications to apply when not shipped subject to the conditions of the Bill of Lading of which this is a part, and the cost of marine insurance will be added over any part of the route that may be by water." (Record, pages 36, 37.)
>
> "No. 16. Owner's Risk.—All property received and shipped O. R. (meaning owner's risk) is shipped subject to the conditions printed on the back of this receipt, and to all conditions, specified in general tariffs and classifications, and at a reduced rate by reason of the acceptance of such conditions. If the shipper does not accept such conditions he must give notice to the agent at the time of signing shipping bill, and by so doing may

> have goods forwarded subject only to conditions imposed by law, in which case additional charges will be made, as provided in general tariffs and classifications." (Record, page 39.)

This order also indicates that the respondent was given a choice of rates based on full or limited liability of the carrier. The abbreviations "O Rel to Cont val." meaning owner's release to contract valuation, indicates such choice on his part. The record is silent as to whether these abbreviations were written or printed in the shipping order. An examination of the subject matter of the order, however, warrants the inference that they were written in, thereby indicating that the respondent selected the minimum rate based on the minimum valuation.

II.

Summarized and restated with citations of recent cases, the contentions of the petitioner are as follows:

(1)

The Carmack Amendment and the Interstate Commerce Act supersede all state laws prescribing the terms and conditions of interstate bills of lading and defining the rights and obligations of carriers and shippers arising thereon.

By this amendment, Congress has exercised its power over the subject and has taken possession of the domain of regulation. It constitutes special legislation on the subject and fully covers the duties of carrier and shipper arising on such contracts. The subject not only admits of national regulation, but specially calls for it. The law of Nebraska declaring void certain provisions of such contracts is not in aid of the Commerce Act. On the contrary, it is in direct conflict therewith and a burden on interstate commerce.

Southern R. Co. vs. Reid, 222 U. S. 424.

Northern Pac. R. Co. vs. Washington, 222 U. S. 370.

Mondou vs. New York, etc., R. Co., 223 U. S. 1.

Latta vs. Chicago, etc., R. Co., 172 Fed. 850, 97 C. C. A. 198.

(2)

A contract that the carrier shall assume liability only to the extent of an agreed value in consideration of a reduced rate does not "exempt" the carrier from its liability as imposed by the Carmack Amendment, or from its liability as it existed at common law.

(3)

The proviso to the Carmack Amendment does not reserve to the states power to enforce laws in conflict with the Amendment, or inconsistent with the purposes of the Commerce Act.

Robinson vs. Balt. & O. R. Co., 32 Sup. Ct. Rep. 114.

Texas & Pac. R. Co. vs. Abiline Cotton Oil Co., 204 U. S. 442, 446.

Balt. & O. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, 497.

Southern Pac. R. Co. vs. Crenshaw, 63 S. E. Rep. 865.

New York, etc., R. Co. vs. Interstate Com. Com., 200 U. S. 361.

Armour Packing Co. vs. United States, 209 U. S. 56, 72.

The decision of this case below by the United States Circuit Court of Appeals turned upon its construction of this proviso. Commenting upon the Carmack Amendment, that court said:

> "It plainly appears from a reading of the above language that Congress has legislation on the subject of the liability of railroad corporations as common carriers when engaged in interstate commerce. If it were not for the proviso accompanying the language above quoted, we should feel compelled to determine the validity of the contract in question with reference to the law of Congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress undoubtedly was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their common law liability by contract, receipt, rule or regulation. It therefore was aware that the Constitution of Nebraska as interpreted by her Supreme Court, was in conflict with the rule established by the United States Supreme Court in Hart vs. Railway Company, supra; and was also aware that the Supreme Court of Pennsylvania in Grogan vs. Adams Express Co., 114 Pa. 523, refused to follow the rule established by said case of Hart vs. Railway Company, supra; and therefore, in view of these conflicting opinions, very wisely provided that the legislation by Congress should not deprive 'any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' "
>
> (172 Fed. 850, 855.)

That court apparently gave no consideration to the purpose of the Commerce Act, or to the effect such a construction of the proviso would have on the questions of uniformity, equality and unjust discrimination.

III.

The Commerce Act and the Tariffs established pursuant therewith determine the Rights and Obligations of Shipper and Carrier. Such relations are fixed by the mandate of the law and are no longer contractual.

The conditions contained in tariffs and classifications are as binding on the parties as the rates named therein. The condition attached to the tariff under consideration was that the liability of the carrier be limited to the value declared by the shipper. Such a condition determine the aggregate of the rate and the value of the service to the shipper. To enforce it as to one shipper and waive it as to another would necessarily result in inequality and unjust discrimination. The shipper and carrier cannot by contract vary the rate or waive the conditions attached thereto. It follows, therefore, that such conditions cannot be waived or nullified by state legislators or state courts and must be observed until Congress or the Interstate Commerce Commission declare otherwise.

Chicago & Alton R. Co. vs. Kirby, 32 Sup. Ct. Rep. 648.

Armour Packing Co. vs. United States, 209 United States, 57, 72.

Arkansas Fertilizer Co. vs. United States, 193 Fed. 667.

In Re Released Rates, 13 I. C. Rep. 550.

IV.

Assuming, arguendo, that the proviso does reserve to the states power to enforce laws in conflict with the Carmack Amendment, and inconsistent with the purposes of the Commerce Act, and that the status created by the Commerce Act and tariffs filed pursuant therewith, does not control the issue here presented, the following reasons exist why the respondent should not recover more than the agreed value:

(1)

The Constitution of Nebraska, as construed by its Supreme Court, forbids common carriers from limiting their liability as it existed at common law, and the rule of the Federal Court is that the contract under consideration does not limit such liability.

The construction of its Constitution by the Nebraska Court is controlling. The question, however, of what constitutes a limitation of liability as it existed at common law is one of commercial law, and this court is free to apply its own rule as announced in Hart vs. Penn. R. Co., 112 U. S. 331.

(2)

A contract that a carrier shall assume liability only to the extent of an agreed value, in consideration of a reduced rate, estops the shipper from recovering damages in excess of the agreed value.

(3)

A false valuation made for the purpose of securing a lower rate is denounced as a crime by the Commerce Act and the Elkins Act, and public policy forbids the recovery of damages in excess of the agreed value.

Taenzer & Co. vs. Chicago, etc., R. Co., 191 Fed. 543.

Respectfully submitted,
JAMES B. SHEEAN,
Attorney for Petitioner.

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CLERK.

In the Supreme Court of the United States

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,
vs.
BUD R. LATTA,
Respondent.

2

No. [redacted].

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

H. C. BROME,
W. M. HOPEWELL,
Counsel for Respondent.

OMAHA PRINTING CO., OMAHA

In the Supreme Court of the United States

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,
vs.
BUD R. LATTA,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

STATEMENT.

This suit was commenced on the 6th day of November, 1907, by respondent, against the petitioner in the District Court of Burt County, Nebraska.

Petitioner removed the cause to the Circuit Court of the United States for the District of Nebraska, on the ground of a diversity of citizenship. The claim of the respondent, set forth in his second amended petition, upon which the cause was tried, may be summarized as follows:

Petitioner is a common carrier, operating a line of railroad through Nebraska and adjoining states, and on the ninth day of May, 1907, respondent delivered to it two horses of the value of Three Thousand Dollars, at the city of Tekamah, on its line of railroad in Nebraska, to be transported over petitioner's line of railroad and connecting lines, to the city of Waterloo, in the State of Iowa, and paid defendant for such transportation over its line the sum of Twenty-four Dollars and thirty-eight cents ($24.38), advance freight.

On the same day, and while the car containing respondent's animals was enroute near the village of Tyson, in Washington County, Nebraska, and upon petitioner's line of railroad, the negligent construction and operation of the engine pulling the train of which this car was a part, permitted the escape of cinders and coals of fire from its smokestack to the roof of the car containing the animals, originating a fire that destroyed the car and its contents. The petition charges negligence in the origin of the fire, and also negligence in the fact that petitioner's servants and agents in charge of the train refused to allow respondent, who was a passenger upon the train, to remove the animals from the burning car after the fire was discovered and before they were injured, which he claims he was able, willing and offered to do. He sought to recover judgment for the value of the animals, $3,000, and advance freight paid, $24.38, with interest from the ninth day of May, 1907.

The answer of petitioner admits that it is a common carrier of freight from the city of Tekamah to the city of Omaha, Nebraska, and into other states, particularly the State of Iowa, admits the receipt of the horses for transportation from Tekamah to Waterloo, and admits that the animals were burned to death on the ninth day of May, 1907, while in transit and in petitioner's possession.

For a separate defense it alleged that it was an interstate carrier, subject to the regulation and control of the laws of Congress relative thereto, and that by virtue of these laws it was required to file with the Interstate Commerce Commission and to publish its schedule of rates and charges and all rules and regulations in any manner made by it affecting the charges to be made for the transportation of property. That at the time respondent's property was destroyed, it had filed with the Interstate Commerce Commission its schedules of rates and charges, and its rules and regulations applying to the shipment of live stock, and that by its rules and regulations and tables then on file, it was provided as follows:

> "Limitation of Liability. Rates provided on Live Stock will apply on shipments made at

> owner's risk, with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current live stock contract provided by said company, the contract to be first duly executed in manner and form provided therein.
>
> 150 per cent of the rates named in this Tariff will be charged on shipments without limitation of carrier's liability at common law, and under this status shippers will have the choice of executing and accepting contracts for shipment of live stock with or without limitation of liability, the rates to be made as provided for herein."

Petitioner further alleges that under and by virtue of the tariffs of the petitioner company and the Western Classification No. 42, duly adopted, filed with the Interstate Commerce Commission and published as required by law, and in effect at the time of the shipment complained of, it was provided, among other things, that the

> "Ratings given below are based upon values declared by shippers, not exceeding the following, under contract: Each horse or pony (gelding, mare or stallion), mule or jack, $100.00. Each colt (under one year), $50.00. * * * * Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 lbs. or car for each 100 per cent or frac-

> tion thereof, of additional declared value per head; animals exceeding in value $800.00 per head, or when no value is given, will be taken only by special arrangement."

That the valuation of the animals made in the contract of shipment was one hundred dollars each, and that the laws of the United States prevent the petitioner from paying a larger sum to the owner on account of their loss in transit by the negligence of the carrier.

Respondent's reply admits that the tariffs and schedules or rates in force at the date the shipment was made, were on file in the office of the Interstate Commerce Commission of the United States, but alleges that the contract of carriage in this case was made within the State of Nebraska, and subject to the laws thereof, and that insofar as the same sought to limit the liability of the petitioner for the loss of said animals while in transit, it was wholly void, and denies the right or duty of the petitioner to file with the Interstate Commerce Commission any rule or regulation in violation of law, or any contract containing an unlawful limitation of its liability.

A trial was had at the October, 1908, term of the Circuit Court for Nebraska, resulting in a directed verdict and a judgment thereon in favor of respondent for $200.00. Respondent claiming that under the pleadings and evidence he should have recovered a much larger sum, sued out a writ of error to the Circuit Court of Appeals for the eighth circuit, and on the 26th day of July, 1909, that Court reversed the judgment of the Circuit Court for the district of Nebraska and remanded the cause to that court for a new trial, the opinion of the court being as follows:

"Latta brought this suit in a state court in Nebraska against the Chicago, St. Paul, Minneapolis & Omaha Railway Company to recover damages from it as a common carrier for the breach of a contract to transport from Tekamah, Nebraska, to Waterloo, Iowa, one mare and colt. The petition alleges that, by the negligence of the defendant, said mare and colt were burned while being transported on the line of defendant's railway in the state of Nebraska, and claims damages to the amount of $3,024.38. The defendant removed the suit into the circuit court of the United States for the District of Nebraska, where it was tried by a jury. As a part of the cross-examination of the plaintiff, counsel for defendant offered in evidence the contract under which said property was to be transported, also a paper called a 'shipping order.' The offering of these instruments was objected to by counsel for plaintiff, but the trial court overruled the objection and admitted them in evidence. The plaintiff gave testimony tending to prove the alleged negligence and how the loss and injury occurred. He then offered evidence tending to show that the value of the mare and colt was $2,500. Counsel for defendant objected to this testimony in regard to value on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the contract. Counsel for plaintiff then offered to prove by other witnesses the allegation of his petition. Whereupon the trial court ruled that the defendant was liable in any event for the loss of the mare and colt, but that it was only liable for the amount specified in the contract, and against the objection of counsel for plaintiff, directed the jury to return a verdict in favor of plaintiff in the sum of $220.09. It was shown at the trial that the rate of $24.38 charged by the defendant for the transportation of the animals mentioned was its regular tariff based upon the valuation stated in the contract. It was also conceded at the trial that said tariff rate had been filed with the Interstate Commerce Commission, and published as required by law, and that the rules, regulations and tariffs of the defendant on file with the Interstate Commerce Commission disclosed that the above named rate applied to the limited liability contract in use by the company for the transportation of live stock.

The errors assigned herein are that the court erred in refusing to permit the plaintiff to show the actual damage he had sustained, and in so charging the jury as to restrict their verdict to the sum above stated. The contract between plaintiff and defendant for the transportation of the mare and colt, so far as is material to the question now under investigation, was in the following language:

> ·Read this contract.
>
> Chicago, St. Paul, Minneapolis & Omaha Railway Co.
>
> It is the desire of this company that this contract sholl be executed on all shipments of live stock in car load lots or less. In case shipper declines to execute this contract, the valuation of the live stock, as stated by the shipper, shall be stated on the shipping bill, and in such case the rates will be 10 per cent higher than they would be under this contract if he executed it. If the shipper declines either to state the value of the live stock on the shipping bill or execute this contract, the charges in that case will be ten per cent higher than the rates provided in this contract when the owner or shipper declares the value of the stock to be over $800 per head or declines to declare its value.

Nos. of Way-Bills C. G. W.	No. and Kind of Animals in each car. Shipper's count
Initials and Nos. of cars 5721	1 horse 1 colt, 7501½ Live Stock Contract, Tekamah Station, 5-9-'07

This agreement entered into on the day above stated, between the Chicago, St. Paul, Minneapolis & Omaha Railway Company and B. R. Latta.

Witnesseth, That the said Railway Company has this day received from the said B. R. Latta, one horse to be transported from Tekamah, Nebr., station, to Waterloo, Ia., station, consigned to Joe McLaughlin, at D. O. at the rate of trf. per cwt. upon the terms and conditions following that is to say: The said Railway Company shall not be liable for the loss or death of, or any injuries received by any of such stock, unless the same is immediately caused by the willful misconduct or the actual negligence of the said Company, or its agents, servants or employes.

The rates provided in the tariffs of this company are based upon the following value of animals named, to-wit:

One hundred dollars per head on each horse or pony (gelding, mare or stallion), mule or jack.

Fifty dollars per head on each ox or bull.

Thirty dollars per head on each cow.

Ten dollars per head on each calf or hog.

Three dollars per head on each sheep or goat.

And if this shipment is moved at the tariff rate it is agreed that the value of the animals shipped does not exceed, of their kind, per head the above named valuation.

If the shipper declares a value in excess of the above valuation, and this shipment is moved at a rate based thereon, it is agreed that the value of the animals shipped does not exceed such declared valuation, which is as follows:

Each horse or pony (gelding, mare or stallion), mule or jack, per head....	$100.00
Each ox or bull....................	....
Each cow, per head..................	....
Each calf or hog, per head............	....
Each sheep or goat, per head.........	....

The shipment covered by this contract is accepted and forwarded subject to the agreed valuation, and the rate of freight is based on the condition that the railway company assumes liability only to the extent of such agreed valuation.

When the declared value exceeds the valuation on which the tariff rate is charged, an addition of 25 per cent will be made to such rate for each 100 per cent or fraction thereof, additional declared value per head up to $800 per head. When the owner or shipper declares the value to be greater than $800 per head, or declines to declare the value of the stock, charges will be based upon 200 per cent of the rate provided above, based on value of $800.'

The shipping order signed by plaintiff was in the following language:

'See Contract on Back of this Shipping Order.
Chicago, St. Paul, Minneapolis & Omaha
Railway Co.

Shipping Order.

Car No. 5721 (To be retained by Agent) No...
Initials of Car C. G. W. Tekamah, Station
5-9, 1907

(The shipper may elect to accept the conditions printed on the back hereof and as contained in the bill of lading of which this shipping order is a part, or may, as provided below, require the carriage of property at "Carrier's Risk").

Receive, carry and deliver the articles described below in accordance with the tariff and classification in effect at the date of this order and subject to the conditions of the bill of lading of which this shipping order is a part. (For carrier's liability see note below.)

Consignee, Destination, Marks and Routing	Articles	Weight subject to correction
Joe McLaughlin Waterloo, Iowa	1 horse 1 colt under 1 year	2000 750
Charges Advanced.	O rel to cont.val. S. L. & C. Paid to apply, $24.38 B. R. Latta, Shipper	

(In red ink across the face:) Grain subject to Elevator Delivery.

If the shipper elects not to accept the said tariff rates and conditions, he should so notify the agent of the receiving carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to the conditions of the bill of lading of which this order is a part, in order to secure the reduced rates thereon. Property carried not subject to the conditions of the bill of lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States, and of the several states in so far as they apply. Property thus carried will be charged at the higher rating provided in current tariffs and classifications to apply when not shipped subject to the conditions of the bill of lading of which this is a part, and the cost of marine insurance will be added over any part of the route that may be by water.

> No. 16, Owner's Risk. All property received and shipped O. R. (Meaning owner's risk) is shipped subject to the conditions printed on the back of this receipt, and to all conditions, specified in general tariffs and classifications, and at a reduced rate by reason of the acceptance of such conditions. If the shipper does not accept such conditions he must give notice to the agent at the time of the signing of the shipping bill, and by so doing may have goods forwarded subject only to conditions imposed by law, in which case additional charges will be made, as provided in general tariffs and classifications.'

It appears from the record before us that the tariff rate for the transportation of live stock over defendant's road based upon a valuation of $100 each for horses is open to all shippers who will sign the contract prepared in such cases by defendant; that no shipper is entitled to the limited live stock rate unless he signs said contract; that the valuation thus fixed by the contract is arbitrarily fixed long prior to any particular shipment and has no reference to the actual value of any particular horse; that the shipper in order to obtain this limited live stock rate must declare the value of his horse to be $100. The contract in the case at bar said:

> 'If the shipper declares a value in excess of the above valuation, and this shipment is moved

> at a rate based thereon, it is agreed that the value of the animals shipped does not exceed such declared valuation, which is as follows: Each horse or pony (gelding, mare or stallion) mule or jack, per head, $100.'

In other words, if the shipper desires to avail himself of the limited valuation tariff rate, he has no option whatever but to declare his horse to be of the value placed on it by the defendant. There is no use contending that the contract in question was not a limitation of the defendant's common-law liability as a common carrier. The defendant so names it, and it conclusively appears that the limitation of liability is the primary purpose of the provision in regard to value. The question whether the limitation as to value is valid or not, is another proposition. Such a contract was upheld in Hart v. Pennsylvania R. R. Co., 112 U. S., 331, 5 Sup. Ct. 151, 28 L. Ed. 717; the Supreme Court stating the rule as follows:

> 'When a contract of carriage signed by the shipper is fairly made with a railroad company, agreeing on a valuation of the property carried, with a rate of freight based on condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss by the negligence of the carrier the contract will be upheld as a proper and lawful mode of securing a true proportion between the amount for which

> the carrier may be responsible and the freight it receives and of protecting itself against extravagant and fançiful valuations.'

The following cases also are in harmony with the rule above stated: Scruggs vs. Baltimore, etc., Ry. Co. (C. C. 5 McCrary, 590, 18 Fed. 318; Ormsby vs. U. P. R. R. Co. (C. C.) 4 Fed. 760; Judson vs. Western R. R. Corporation, 6 Allen (Mass.) 486, 83 Am. Dec. 646; Adams Express Co. vs. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Ga. Pacific Ry. Co. vs. Hughart, 90 Ala., 36, 8 South. 62; Ullman vs. C. & N. W. Ry. Co., 112 Wis., 150, 88 N. W., 41, 88 Am. St. Rep. 949; Railway Co. vs. Sowell, 90 Tenn. 17, 15 S. W. 837, Rosenfeld vs. Peoria, Decatur & Evansville Ry. Co., 163 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Western Railway Co. vs. Harwell, 91 Ala. 340, 8 South, 649; 4 Elliot on Railroads, 2336; 14 L. R. A. pp. 434, 435, note; 1 Hutchinson, Carriers, sec. 427, and cases cited. But these cases all deal with the power of common carriers to limit their common law liability in the absence of a statute restricting such power. The Constitution of Nebraska in article 11, Sec. 4, provides: "The liability of railroad corporations as common carriers, shall never be limited." This language by an unbroken line of decisions by the Supreme Court of Nebraska has been construed as avoiding all attempts to limit the common law liability of railroad corporations as common carriers. Missouri Pacific R. Co. vs. Vandeventer, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129; St. Joseph & Grand Island R. Co. vs. Palmer, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335; Union Pacific R. Co. vs. Metcalf, 50 Nebr. 452, 69 N. W., 961; C. B. & Q. R. Co., vs. Gardiner, 51 Nebr., 70, 70 N. W. 508; Wabash R. Co. vs. Sharpe, 76 Nebr. 424, 107 N. W., 758, 124 Am. St. Rep. 823. The case of C. B. & Q. vs. Gardiner, 51 Nebr. 70, 70 N. W. 508, involved the shipment of a horse from Peoria, Ill., to Hastings, Neb. The value of the horse was agreed to be $100 in the contract of shipment, and in connection therewith was the following language:

> 'And that the above rate of transportation is based upon the agreement that in case of loss or damage, whether resulting from accident or negligence of said railroad company or its servant, said railroad company does not assume a liability for such loss or damage to exceed the valuation of each animal.'

The Supreme Court of Nebraska, held this provision of the contract void, although it was contended that the contract was good in Illinois, where it was made. The law as stated in the Constitution of Nebraska as interpreted by her Supreme Court in the absence of legislation by Congress is clearly applicable to contracts involving interstate commerce. Chicago, Milwaukee & St. Paul Railway Company vs. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Pennsylvania R. R. Co. vs. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. The contract in question was a Nebraska contract, and her constitution as interpreted by her Supreme Court, which interpretation is binding on us, struck down the limitation of the right of recovery in said contract as soon as it was made. Chicago, Milwaukee & St. Paul Railway Company vs. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Pennsylvania R. R. Co. vs. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268.

It is claimed, however, that Congress has legislated upon the very subject now under discussion, and that in consequence thereof the law of Nebraska, so far as it is sought to enforce the same against the provisions of a contract in relation to Interstate Commerce, is inoperative. In this connection our attention is called to Act June 29, 1906, c. 3591, sec. 7, 34 Stat. 595, (U. S. Comp. St. Supp. 1907, p. 909). In the section referred to is found the following language:

> 'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in

> another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.'

It plainly appears from a reading of the above language that Congress has legislated upon the subject of the liability of railroad corporations as common carriers when engaged in interstate commerce. If it were not for the proviso accompanying the language above quoted, we should feel compelled to determine the validity of the contract in question with reference to the law of Congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress, undoubtedly, was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their common-law liability by contract, receipt, rule or regulation. It therefore was aware that the Constitution of Nebraska as interpreted by her Supreme Court was in conflict with the rule established by the United States Supreme Court in Hart vs. Railway Company, supra; and was also aware that the Supreme Court of Pennsylvania in Grogan vs. Adams Express Company, 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, refused to follow the rule established by said case of Hart vs. Railway Company, supra; and therefore, in view of these conflicting opinions, very wisely provided that the legislation by Congress should not deprive "any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

We are therefore of the opinion that the right which the plaintiff in this case had under the law of Nebraska to sue for the full value of his property, was not taken away by the legislation of Congress herein referred to, but was preserved to him, and that he may now enforce that right as he has attempted to do.

It results that the judgment of the trial court must be reversed and a new trial granted, and it is so ordered."

No petition for certiorari was lodged with this court respecting that judgment, and agreeably to the rules of the Circuit Court of Appeals for the Eighth

Circuit its mandate reversing the judgment and ordering a new trial was filed with the Clerk of the Circuit Court for the District of Nebraska, the cause placed upon the trial docket and a trial had on the 16th day of April, 1910, resulting in a verdict and judgment for respondent in the sum of $3,583.00.

At this trial the Railway Company did not contest the contention that the animals were destroyed by reason of its negligence, or the correctness of Latta's claim as to their value at the time of their loss, and the record at the second trial is a fac simile of that made upon the first trial, except that Latta was permitted to offer additional evidence substantiating his claim as to the value of the animals destroyed, and the tariff alleged by the Railway Company's answer and admitted by Latta's reply to have been on file with the Interstate Commerce Commission and duly published at the time the contract was entered into, was received in evidence whereas it had been excluded as immaterial by the court upon the former trial. From this judgmnt petitioner sued out a writ of error to the United States Circuit Court of Appeals for the eighth circuit, where the judgment rendered at the circuit was affirmed on the 10th day of January, 1911. The affirmance proceeding upon the theory that the issues upon the second trial having been precisely the same as those presented at the first trial, and there being no substantial change in the evidence, the assignments of error under the second writ presented only questions that had been considered and determined by the Court of Appeals upon the prior hearing; not open for reconsideration and rehearing upon the second writ of error. By this proceeding petitioner seeks to procure a review of the case by this court.

ARGUMENT.

I.

PETITION FOR CERTIORARI COMES TOO LATE.

It may be conceded for the purpose of this objection that the question whether or not the provisions of the Federal Interstate Commerce act as amended, supersede all state laws designed to prevent common carriers from contracting for exemption from liability, predicated upon their own negligence; is important enough to invite consideration and determination by this court. But assuming this to be so, we respectfully submit that this application for certiorari comes too late. The decision of the Circuit Court of Appeals for the Eighth Circuit holding that the Congress had expressly reserved to respondent the right to assert the invalidity of the "Limitation of Liability" clause of the contract in question, because the constitution of Nebraska as construed by the highest court of the State, declared it invalid; was announced and embodied in the judgment of that court on the 26th day of July, 1909. If petitioner thought this decision was wrong it might have applied for certiorari to this court immediately, or under the rule announced in The Conqueror, 166 U. S., page 110; Ayres vs. Polsdorfer, et al., 187 U. S., page 585, and Bonin vs. Gulf Co., 198 U. S. 115, within one year from the date of the entry of judgment, but not afterward. Instead of pursuing that course petitioner followed the mandate of the Circuit Court of Appeals back to the Circuit Court for the District of Nebraska, subjected respondent to the annoyance and expense incident to a re-trial of the case in the Circuit Court, prosecuted a second writ of error to the Circuit Court of Appeals, and now, nearly two years after the rendition of the judgment and the declaration of law of which it really complains, applies to this court for relief.

That this court may take jurisdiction of a case by certiorari at any stage of the proceedings in the court below, either before or after judgment, must be conceded, but the authorities cited *supra* definitely and certainly establish the rule that the application for certiorari must be made must be made within one year after the date of rendition of the judgment, respecting which complaint is made.

It is true that the final judgment in favor of respondent was entered by the Circuit Court of Appeals for the Eighth Circuit, on the tenth day of January, 1911, but it is likewise true, that the judgment of the Circuit Court of Appeals for the Eighth Circuit really sought to be reviewed in this proceeding, was entered on the 26th day of July, 1909, almost two years prior to the date of the application for certiorari. In that decision and judgment the law of the case was declared, and necessarily followed by the Circuit Court upon the second trial.

Upon the second writ of error the Court of Appeals was not at liberty to announce a different rule, even though it were of the opinion that its prior decision was erroneous. No other or different question was presented upon the second writ of error, and the real purpose of the present petition for certiorari is to procure this court to take jurisdiction of this cause and review and reverse the decision of the Circuit Court of Appeals, entered July 26, 1909.

That the judgment entered upon the second writ of error was the only one permissible upon the record as it then stood, is perfectly clear.

Petitioner sinned away its day of grace, and ought not now to be permitted to invoke the jurisdiction of this court respecting a judgment rendered nearly two years before the petition for certiorari was lodged here.

II.

THE OPINION AND JUDGMENT OF THE CIRCUIT COURT OF APPEALS UPON THE MERITS IS RIGHT.

Admitting the importance of the question determined in this case, we submit that the correctness of the conclusioin reached by the Court below is not open to serious question. We have set forth in the statement contained in this brief the opinion of the learned Circuit Judge, who spoke for the Circiut Colurt of Appeals, and cannot hope, by argument here, to make clearer or more cogent the reasons assigned by the court for the conclusion reached and judgment entered by it. If we were to assume that the Circuit Court of Appeals was wrong in its conclusion, and that the right of action and remedy reserved to the shippers, under existing law by the express terms of the Act of Congress, is not the right of action invoked in this case, the result would be the same:

1. Because in the case of Chicago, M. & St. P. R. Co. vs. Solan, 169 U. S., 133, this court determined

that regulations relating to contracts made by carriers, of the character in question here,

> "Are not, in themselves, regulations of interstate commerce, although they control in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. * * * It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect is to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

In the later cases of Pennsylvania R. Co. vs. Hughes, 191 U. S. 477, and Martin vs. Railroad, 203 U. S. 284, the doctrine of the Solan case was reaffirmed.

It is true that these cases were all decided prior to the amendment to the Interstate Commerce Act of June 29, 1906, and it is true that that amendment quoted in the opinion of the Court of Appeals, supra, does relate to the subject under discussion. It is likewise true that the subject is one over which the Congress has undoubted jurisdiction, and if there be a conflict between the state regulation and the federal enactment, the federal rule must prevail, but it cannot be said that there is anything in the provisions of the Interstate Commerce Act anywhere, militating against the exercise of the police power of the States in aid of interstate commerce, although such enactments may incidentally effect such commerce, so long as they do not impose a burden upon it, and this conclusion is supported by the reasoning of this court in Western Union Telegraph Co. vs. Commercial Milling Company, decided by this court November 28, 1910, and Chicago and Rock Island Railway Company vs. State of Arkansas, decided February 20, 1911.

2. Because the provision of the constitution of Nebraska under consideration, as construed by the highest court of that State, is in entire harmony with the federal rule as declared in the provision of the Interstate Commerce Act. The declaration that a railroad

> "Shall be liable * * * for any loss, damage or injury to such property caused by it. * * * And no contract, receipt, rule or regulation shall ex-

> empt such common carrier, railroad or transportation company from the liability hereby imposed."

is not a declaration of the common law as construed by this court in Hart vs. Pennsylvania R. R. Co., 112 U. S., 330, but was and is a declaration of the rule announced in the Nebraska cases by reason of its constitutional provision, and in Railroad vs. Solan, supra, by reason of the statutory provision of the State of Iowa. Any other construction would fail to express the true meaning and intent of the language used in the statute.

The Supreme Court of Iowa, in an opinion announced November 16, 1910, reported in Volume 128, Northwestern Reporter, at page 663, was confronted with the same contention made here. After pointing out the fact that that court, by a long line of decisions, had held an agreement limiting the liability of a common carrier in this manner, not only prohibited by the terms of the Iowa statute, but void at common law as against public policy said

> "It is urged, however, that the cited cases were all decided prior to the enactment of the interstate commerce law and that they are no longer applicable. But this contention avails little to the defendant, because we find nothing in the interstate commerce law which supersedes in any manner the rule of liability which may

obtain in the different states. The following excerpt from the interstate commerce act comprises all that is contained therein that is in any degree pertinent to this question: 'That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury, to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' On the face of it, this provision is rather confirmatory than otherwise of the rule which obtains in this state. That such rule presents no conflict with the act seems to have been held in Pennsylvania R. Co. v. Hughes, 191 U. S., 477, 24 Sup. Ct. 132, 48 L. Ed. 268."

The same contention was made in the Supreme Court of Nebraska in Miller vs. C. B. & Q. R. Co., 85 Nebr., 458, and the act of the Congress under consideration here held not to in any manner supersede or amend the existing law with reference to the liability of a common carrier for its negligence in transporting of property by interstate shipments.

The suggestion that respondent perpetrated a fraud upon petitioner and that petitioner relied upon the printed limitation of value contained in its contracts as being the true value of the animals, at the time of the shipment, is not supported by their pleading or proof. The tariff rate published by petitioner authorized the transportation of horses over its road, based upon a valuation of $100.00 each. It was intended to and it did authorize and invite all shippers to transport all kinds of horses, at the tariff rate, provided the shipper would agree in advance to declare the value of the animal to be $100.00. The Court of Appeals well said:

> "There is no use of contending that the contract in question was not a limitation of the defendant's common-law liability as a common carrier. The defendant so names it, and it conclusively appears that the limitation of liability is the primary purpose of the provision in regard to value."

It may well be that a carrier may base its charges upon the value of the article shipped and charge a higher price for the increased risk incident to the transportation and care of the more valuable article, and that the shipper who falsely, and for the purpose of obtaining the lower rate misstated the value of his property, would be estopped as against a carrier who had relied upon his false statement as to value, and been induced to carry the article at a lower rate by reason thereof, from asserting the true value, as against the carrier when the article was lost or destroyed, but that question is not presented by the record, or involved in this case in any manner.

In conclusion, we submit that whether we measure the rights of the parties to this litigation by the undoubted rule in force prior to the amendment to the Interstate Commerce Act, or seek to adjust them solely with reference to the provisions of that amendment, the result is the same. The judgment complained of reflects a correct exposition of the rights of the parties, and the petition for certiorari should be denied.

Bud R. Latta,
Respondent.
By
H. C. Brome,
W. M. Hopewell,
His Attorneys.

Office Supreme Court, U. S.
FILED.
FEB 28 1911
JAMES H. McKENNEY,

THE SUPREME COURT OF THE UNITED STATES

231.
[redacted]
No. [redacted]

Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Petitioner,
v.
Bud R. Latta,
Respondent.

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court, for its review and determination, the case of *Bud R. Latta, Plaintiff in Error, vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendant in Error.*

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, respectfully represents to this Honorable Court as follows:

I.

That on the 6th day of November, 1907, Bud R. Latta, respondent herein, as a citizen and resident of the state of Nebraska, filed in the office of the clerk of the district court of the state of Nebraska in and for Burt County in said state, a petition against your petitioner herein, a citizen and resident of the state of Wisconsin, praying judgment against it in the sum of $3,024.38, with interest and for costs of suit, on account of the alleged loss by fire of two horses while being transported as an interstate shipment from Tekamah in Burt County, state of Nebraska, to Waterloo in the state of Iowa; that said cause was thereafter removed (Record pp. 65 to 70 inc.) to the United States Circuit Court for the District of Nebraska, Omaha Division, in which court the same was tried, upon issues presented by proper pleadings (Record pp. 1 to 22 inc.)

II.

It was conceded by the pleadings and undisputed evidence that the respondent lived at Tekamah; shipped a mare weighing 2,000 lbs. and a colt weighing 750 lbs. on the 9th day of May, 1909, from Tekamah, Nebraska, bound for Waterloo, Iowa; that both animals were burned while in transit in petitioner's car shortly after starting on said journey; that at and before the time of delivering said animals for shipment this petitioner had on file its rules, regulations and tariffs and classifications with the Interstate Commerce Commission, which were published according to law, and were in force at said time controlling live-stock shipments of the kind in controversy and by said rules, regulations, tariffs and classifications, it was specifically provided:

"Ratings given below are based upon values declared by shippers not exceeding the following under contract:

Each horse or pony (gelding mare or stallion), mule or jack	$100.00
Each colt (under one year)	50.00

"Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 lbs. or car for each 100 per cent, or fraction thereof, of additional declared value per head; animals exceeding in value $800 per head, or when no value is given, will be taken only by special arrangement * * *"

"Live Stock L. C. L. (limited liability under contract, at values stated above), the following estimated weights (exceptions to Rule 1), viz: One horse (gelding or mare), or pony, mule or domestic horned animal (except bulls), N. O. S., 2,000 lbs.; two animals 3,500 lbs. * * * 1." (the figure 1 meaning first-class rate.) (Record p. 46, Exhibit 3).

That before delivering said animals for shipment the respondent herein made a declaration to petitioner's agent at Tekamah, Nebraska, that the value of each of said animals was $100, for the express purpose of obtaining the rate per hundred pounds shown and authorized by the rules, regulations and tariffs on file with the Interstate Commerce Commission of the United States and published as required by law, being an aggregate sum of $24.38, which was paid by respondent to the petitioner and was included in the amount sought to be recovered in the trial court. That according to said rules, regulations, tariffs and classifications the standard rate for the kind of shipment involved herein was fixed at a stated number of cents per hundred pounds for each $100 of valuation, and such rate per hundred pounds increased as the valuation increased. At the trial, respondent seeking to sustain the allegations of his petition, testified that the animals were worth $3,000,—viz: the mare $2,500.00 and the colt $500.00,—contrary to his declaration of value made at the time of tendering them for shipment, and which secured for him the lower rate.

(b) That the contract being primarily one to limit the carrier's common law liability, the decisions upholding such contracts were not applicable to the present case, since

> "The constitution of Nebraska in Article 11, Section 4, provides:
>
> > 'The liability of railroad corporations as common carriers shall never be limited.'
>
> The contract in question was a Nebraska contract and her constitution, as interpreted by her supreme court, which interpretation is binding on us, struck down the limitation of the right of recovery in said contract as soon as it was made."

(c) That the legislation of Congress upon the subject of interstate commerce is not effective to destroy the operation of the law of Nebraska upon the provisions of a contract covering an interstate shipment.

> "In this connection our attention is called to Section 20, Chapter 3591, 34 Stat., 595. In the section referred to is found the following language:
>
> > 'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.'

It plainly appears from a reading of the above language that Congress has legislated upon the subject of the liability of railroad corporations as common carriers when engaged in Interstate Commerce. If it were not for the proviso accompanying the language above quoted we should feel compelled to determine the validity of the contract in question with reference to the law of Congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress, undoubtedly, was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their common law liability by contract, receipt, rule or regulation. It, therefore, was aware that the Constitution of Nebraska as interpreted by her Supreme Court, was in conflict with the rule established by the United States Supreme Court in *Hart v. Railway Company, supra;* and was also aware that the Supreme Court of Pennsylvania in *Grogan v. Adams Express Company,* 114 Pa., 523, refused to follow the rule established by said case of *Hart v. Railway Company, supra;* and therefore in view of these conflicting opinions very wisely provided that the legislation by Congress should not deprive 'any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' "

IV.

That thereafter said cause having been remanded to the Circuit Court of the United States for the District of Nebraska, Omaha Division, on the 16th day of April, 1910, a second trial was had therein, resulting in a verdict of the jury, directed by the court, for the sum of $3,583.00, upon which judgment was then entered with costs of the action; and in so doing, the trial court endeavored to act in harmony with the opinion accompanying the reversal of its former judgment by said Circuit Court of Appeals.

Thereupon this petitioner took error proceedings to said Circuit Court of Appeals for the Eighth Judicial Circuit and upon hearing and argument had in said court on the 10th day of January, 1911, the judgment of said Circuit Court for the District of Nebraska, so last rendered as aforesaid, was affirmed.

V.

The following admission was made by counsel for respondent Latta at each of the trials of said cause:

> "I am willing to admit that the tariffs and schedules of rates in force and in use by defendant in making the contract with the plaintiff for the shipment of said mare and colt, was in fact, at the date said contract was made, not only filed in the office of the Interstate Commerce Commission, but published as required by law, and I admit that Exhibit 3 is the tariff referred to." (Record p. 45.)

In the progress of the first trial counsel for this petitioner, the railway company, offered in evidence defendant's Exhibit 3 (as the same appears at Record page 46), which contained so many of its rules, regulations, tariffs and classifications on file with the Interstate Commerce Commission and published according to law, as are applicable to, and as controlled, the shipment in question, which was objected to as incompetent, irrelevant and immaterial, and the objection sustained by the trial court, thus barring said Exhibit 3 as evidence.

Thereupon this petitioner took error proceedings to said Circuit Court of Appeals for the Eighth Circuit, and upon hearing and argument had in said court on the 10th day of January, 1911, the judgment of said Circuit Court for the District of Nebraska, rendered as aforesaid, was affirmed on the 11th day of January, 1911, and the court entered its order of affirmance as follows:

> "United States Circuit Court of Appeals, Eighth Circuit. December Term, 1910, Wednesday, January 11, 1911.
>
> Chicago, St. Paul, Minneapolis
> and Omaha Railway Company,
> Plaintiff in Error,
> vs.
> No. 3444.
> Bud R. Latta.
>
> In Error to the Circuit Court of the United States for the District of Nebraska.
>
> This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.
>
> ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs on the authority of the opinion of this Court in the former cause between the same parties (172 Fed., 850; 97 C. C. A., 198); and that Bud R. Latta have and recover against the Chicago, St. Paul, Minneapolis and Omaha Railway Company the sum of twenty dollars for his costs herein and have execution therefor.
>
> January 11, 1911."

(Record p. 72).

That at the second trial of said cause the same objection to the admission of said exhibit 3 as evidence was made by counsel for respondent; but, contrary to the ruling upon the former trial, the objection was overruled and exhibit 3 was received in evidence.

At the first trial in the Circuit Court for the District of Nebraska, and at the first hearing in argument, on error proceedings brought by the respondent herein in the Circuit Court of Appeals for the Eighth Circuit, the validity of the "limitation of liability" clause in the contract or bill of lading issued by the carrier was apparently the controlling feature in the mind of the court, in arriving at a conclusion as to the right of the respondent to recover the full value of the animals; that neither at said first trial in the trial court, nor at the hearing, nor in the opinion rendered thereon by the appellate court, was consideration given to the fact that the rights of the parties in respect to the tariff, rates and rules and regulations governing the same were fixed by a condition or status raised by law, independent of contract between the parties, which neither the shipper nor the carrier could change or modify.

Upon the second trial the trial court admitted exhibit 3, thereby making it certain, even if a doubt existed before, that the rights of the parties were controlled exclusively by the laws of the United States in respect to the charges for transportation of interstate shipments, and the method of their determination, and not by contractual relations between the carrier and the shipper.

VI.

That the matter involved in said litigation is one of great public interest and importance throughout the United States, wherever commerce is moved by common carriers,—and is of grave and serious concern to common carriers and shippers alike. The case presents propositions of law which appear in conflict with the laws of the

Congress of the United States, the rulings of the Interstate Commerce Commission, and the decisions of this Honorable Court; and leaves the door open for illegal discrimination by common carriers in favor of preferred shippers; favors shippers originating interstate commerce in one state as against those originating like commerce in other states, and threatens the success of the primary purpose for which the laws of Congress regulating commerce among states by common carriers was enacted,—that of preventing undue discrimination giving rebates, and of affording equal and uniform treatment to shippers and defining and creating the legal rights and duties of shippers and carriers.

VII.

The legal questions involved are as follows:

(1) The shipper having declared the value of the animals at the time of tendering them for shipment, for the purpose of obtaining the lowest rate for the shipment, between interstate points, and having secured a rate based upon such value, ascertained in the manner required by the rules, regulations and tariffs filed with the Interstate Commerce Commission, and published as required by law, without collusion or fraud on the part of the carrier, would it not be illegal under the federal commerce act for the carrier to pay a greater sum to the shipper than such declared value?

(2) Did Congress by section 6 and section 20 of the interstate commerce act legislate in respect to interstate rates, discrimination, the giving of rebates and the adoption of devices therefor; also in respect to bills of lading and receipts relating to interstate shipments, so that substantive legal rights (as distinguished from

remedies or methods of enforcing the same) are created thereby to the exclusion of causes of action or substantive legal rights existing at common law, or by the written law of the several states?

(3) Is not a shipper declaring a valuation, which is stated in a contract or bill of lading for the purpose of securing (and which is thereby secured) without collusion or fraud on the part of the carrier, a rate for transportation of an interstate shipment, legally estopped from claiming or recovering a sum of money in excess of such declared valuation in a suit for damages for loss of such shipment?

VIII.

Your petitioner urges that said judgment of said Circuit Court of Appeals is erroneous, for that,

(a) Said judgment and opinion in support of the same are in opposition to, and in conflict with, the laws of the United States as enacted by the Congress thereof, and as declared by this honorable court, and many of the courts of the several states in that: Section 6 of an act entitled "An Act to Regulate Commerce," approved February 4, 1887 (24 Statutes at Large, 379), as amended by the act of June 29, 1906, known as the Hepburn Act (34 Statutes at Large, 584), in force at the date of said shipment, commands equal and uniform service and treatment to shippers. By said act penalties are imposed for the acceptance of any

> "greater, or less, or different compensation * * * or for any service in connection therewith"

than the rates and charges

> "specified in the tariff filed and in effect at the time."

To that end it is also made unlawful for a carrier by any device to

> "extend to any shipper any privileges or facilities * * * except such as are specified in the tariff;"

which rates, fares and charges, rules and regulations, when filed and published, become a legal rule of action controlling the carrier in respect thereto; and may not be departed from, nor may any greater or less or different compensation, rule or regulation, be prescribed or enforced except and until authorized by the Interstate Commerce Commission,—that permitting the respondent to recover more than the value declared for purpose of securing the rate fixed,—is a forbidden departure from the law recognized by the Interstate Commerce Commission, as appears *In the Matter of Released Rates*, 13 Int. St. Com. Rep., 550.

(b) Said judgment and opinion is erroneous for; that the record shows the terms of the live-stock contract as to rates were embodied in the tariffs filed with the Interstate Commerce Commission and legally published; that they thereby became a part of such tariffs as well as of the law; that they remain a part of the tariffs and the law until set aside by the Interstate Commerce Commission; that they are, consequently, binding upon both shipper and carrier and entitled to the same force and effect as if embodied in the interstate commerce act itself; that a departure therefrom, either by shipping upon different terms, or recognizing a different measure of liability in the event of loss or injury to the property, than is prescribed by said contract, constitutes *a discrimination prohibited by the terms of the act;* that respondent having violated the law in understanding the valuation of said animals, he should not be allowed to urge a claim founded upon his own iniquity.

> "When regularly published it (the rate) is no longer the rate imposed by the carrier, but the rate imposed by the law. The law governing transportation between the two points for which that rate was established requires that rate to be paid by the shipper and collected by the carrier, and any departure from it, either by the carrier or the shipper, is as much a crime as it would be if the rate had been fixed by specific enactment. Not even a court may interfere with a published rate or authorize a departure from it when it has been established voluntarily by the carrier."

Poor Grain Co. v. C. B. & Q. R. R. Co., 12 Int. St. Com. Rep., 418, 422.

(c) Said judgment and opinion is also erroneous for; that the rights and duties of shipper and common carrier, since the passage of the Hepburn Act, in respect to the rates and charges for interstate transportation, are not determined by private contract between parties, but are controlled by the tariffs filed with the Interstate Commerce Commission and published as required by law.

(d) That said judgment and opinion is erroneous for; that by paragraphs 11 and 12 of Section 20 of the Interstate commerce act, as amended by the act of June 29, 1906 (34 Stat. L., 595), known as the Carmack amendment, a bill of lading is required to be issued for each interstate shipment by the initial carrier; that said written contract, exhibit 1, was a bill of lading and valid both as showing the contractual relations between the parties in so far as they were not limited by the terms of the Federal act; and also as containing evidence of the declaration of value made by the shipper; that exhibit 1 was properly admissible as containing evidence of such declaration, whatever may have been the legal status of the "limitation of liability" clause contained therein; that such declaration constituted such misconduct as to work an estoppel *in pais* against the recovery of an amount in excess of such declared value when the animals were lost.

(e) That said judgment and opinion ignore the fact that the rate charged for such transportation is fixed in such tariff under legal authority on a graduated valuation declared by the shipper; that the respondent herein declared a valuation for the purpose of securing and did secure the rate charged and received without collusion or fraud on the part of the railway company; that the shipment at the time of its loss was moving in accordance therewith; that these conditions appearing, the law fixed the status of the parties and of the shipment and that it would have been a violation of law to depart therefrom.

That said interstate commerce act, as so amended, applies to the entire territory comprised in the United States, and governs all common carriers by rail operating therein; that the same substantive legal rights abide with a shipper in Illinois who ships to Nebraska, as with a shipper of Nebraska who ships to Illinois; that to dissect the territory of the United States into fragments coincident with state lines and to apply said law of Congress only to a state as it may refrain from passing, or refuse to, pass laws inconsistent with said law of Congress or opposed thereto, renders the entire purpose and scope of the Federal law in the respects covered by sections six and twenty of said interstate commerce act, unavailing and nugatory, in respect to discrimination forbidden by said act, in each state that shall see fit to adopt such inconsistent, opposing or contrary laws, and the tendency and effect of the decision and judgment of said Circuit Court of Appeals is to uphold such laws of the several states when enacted, and to prevent the enforcement of, and to destroy, said laws of the United States regulating and controlling interstate commerce, when the latter shall be opposed to, or in conflict with, such laws of the several states.

(f) That said judgment is also erroneous in that it sets at naught and refuses to give the petitioner the benefit of the facts pleaded by it as an estoppel, and which facts were established by evidence upon the trial of said cause. The rate charged and received for the transportation of the animals rested upon the valuation and was so known to be based by the respondent; and a false declaration of value, either in writing or orally expressed, was a misrepresentation of their true value in order to gain an interstate rate of charge to which respondent was not entitled, and was an attempt to deprive your petitioner of the right to be compensated in proportion to the value of the animals and consequent risk assumed, and thereby tended to lessen the vigilance which your petitioner should have otherwise observed; and also exposed your petitioner to a greater risk than it intended or was bound to assume for the rate actually charged and received. The advantage thus gained by respondent and the loss suffered by petitioner are repugnant to principles of fair dealing and the freedom of contract and therefore in conflict with sound public policy.

Hart v. Penn. R. R. Co., 112 U. S., 331.

In re Released Rates, 13 Int. St. Com. Rep., 550.

That the valuation and freight rate did not become fixed until the former was stated by the shipper. The rate was graduated according to valuation. If each animal had been declared to be worth more than $100, the rate would have been fixed according to the tariff at an increased stated per cent for each 100 per cent or fraction thereof of additional value. The respondent made his choice of rates, measured by the valuation expressed, within those fixed by law. He ought not to be permitted to recover a greater sum, as the value of the animals, when lost or destroyed, than the value declared for the purpose of securing the lower rate.

Your petitioner further represents, that it has filed in the clerk's office of this Honorable Court a certified copy of the transcript of the record, including all proceedings, in the United States Circuit Court of Appeals, Eighth Circuit.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record of proceedings of the said United States Circuit Court of Appeals for the Eighth Circuit in the cause of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error, against Bud R. Latta, defendant in error, No. 3444, to the end that said case may be reviewed and determined by this court as provided in the act of Congress entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases, the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem appropriate and in conformity with said act, and that the judgment of said United States Circuit Court of Appeals for the Eighth

Circuit in said case, and every part thereof, may be reversed by this Honorable Court.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, *Petitioner.*

By..........................

....

....

State of Nebraska,
County of Douglas, } ss.

......................, being duly sworn, says that he is one of the counsel for the petitioner above; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

....

Subscribed in my presence and sworn to before me by .... this .. day of February, 1911.

....

Notary Public,
Douglas County, Nebraska.

My commission expires ...., 19...

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this court.

....

Counsel for Petitioner.

26

MAR 4 1911
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1910.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,

v.

BUD R. LATTA,
Respondent.

No. [redacted] [redacted] 231.

BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CARL C. WRIGHT,
BENJAMIN T. WHITE,
Counsel for Petitioner

REED PRINTING COMPANY

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1910.

CHICAGO, ST. PAUL, MINNEAPOLIS
AND OMAHA RAILWAY COMPANY,
Petitioner,
v.
BUD R. LATTA,
Respondent.

BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

STATEMENT.

For the sake of clearness, the parties hereafter are designated as in the trial court—plaintiff and defendant. Briefly stated, the facts are as follows:

On May 9, 1907, plaintiff shipped from Tekamah, Nebraska, to Waterloo, Iowa, one mare and one colt which were destroyed by fire while in the possession of defendant, and before the completion of the transportation. For the purpose of the shipment, and determining the rate to be charged in accordance with the rules and tariffs (record p. 46, Exhibit 3) the plaintiff declared the value of the animals to be $200. The statement of value was entered on the contract of shipment, or bill of lading (pp. 33 to 40, Defts. Ex. 1), and the shipping order (pp. 41 to 44, Defts. Ex. 2), both of which were signed by the plaintiff.

The petition was in usual form alleging shipment of the animals in question from Tekamah, Nebraska, to Waterloo, Iowa; that the value of the animals was $3,000. The answer admitted their shipment and destruction while in possession of the defendant; denied the negligence, and as a separate defense set forth that the carriage was interstate in character, and was shipped under the contract above referred to, in which the value was declared at $100 for each animal. As a further and separate defense it was set forth that the tariffs of the defendant were regularly published and filed as required by the act of congress regulating interstate commerce, and that the shipper, for the purpose of securing the rate named in said tariff, had declared the value of the animals to be $100 each; that by reason of the premises, the plaintiff was estopped to assert that they were of greater value after their destruction; that in understating the value of said animals plaintiff violated the law, and such violation should also prevent a recovery for a greater value than that declared.

The reply of plaintiff admitted the interstate character of the transaction and the filing of the tariffs of the defendant company, but alleged that the shipment was made in Nebraska, and was therefore controlled by the laws of the state of Nebraska, which prohibited the limitation of the liability of the defendant carrier.

At the trial plaintiff's counsel admitted (record p. 45) both the filing and publishing of the tariffs and classifications of the defendant as required by law; copy of so much of the same as is pertinent to the case is set forth in the petition for the writ (p. 2 and 3) which this brief accompanies.

The trial court in this case directed the jury to return a verdict for the full value of the animals in question with seven per cent interest thereon from the date of their destruction. Doubtless the trial court did this in the belief that it was in accordance with the decision of the Circuit Court of Appeals for the Eighth Circuit, when the case was previously before it (*Bud R. Latta, Plaintiff in Error, v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendant in Error*, 172 Fed. Rep. 850, 97 C. C. A. p. 198).

STATEMENT OF LEGAL PROPOSITIONS.

The questions arising on the face of the petition for the writ may properly be stated as follows:

(1) Is a declaration of value of property to be transported as an interstate shipment, for the purpose of securing a rate, valid and binding upon the shipper?

(2) Are the rights of the shipper and carrier in the case of rates and the method of their determination in case of interstate shipment, to be determined by the laws of the United States or must they be determined according to the laws of the state where the shipment originated?

(3) In case the carrier has filed and published tariffs, as required by the interstate commerce law, providing that the rate shall be based upon the value of animals shipped, and a shipper for the purpose of taking advantage of a rate upon a lower valuation, makes

a declaration of such valuation, can such shipper thereafter claim damages to the animals in excess of the amount so declared by him when they are lost or destroyed while in charge of the carrier?

The legal tariffs of the petitioner made provision for the classification of animals according to value, and the rates which the petitioner was authorized, and was compelled, to charge, were dependent upon the value of the animals as declared by the shipper. There was no collusion between the shipper and the carrier in this case whereby the animals were received under a false declaration of value knowingly by the carrier. The shipper stands alone in his concededly fraudulent conduct. There is every reason why the carrier should be protected. Why the guilty shipper should be protected is inexplicable. He was not compelled, oppressed nor overreached, but the carrier was misled and defrauded. It is peculiar—perhaps the irony of fate—that the shipper should profit by his misdeeds, and that the carrier should suffer two fold—once in the loss of its proper rate of charge, and again in being compelled to pay for loss of property at figures far in excess of the value of the risk it supposed it was assuming.

THE ESTABLISHMENT OF RATES ACCORDING TO VALUE FOR INTERSTATE COMMERCE IS PERMITTED UNDER THE INTERSTATE COMMERCE LAW: UNDERSTATING VALUES KNOWINGLY TO OBTAIN A RATE WHICH THE TRUE VALUE WILL NOT WARRANT, IS TO USE THE DECLARATION OF VALUE AS A DEVICE IN VIOLATION OF LAW, AND THEREFORE SHOULD PREVENT THE SHIPPER FROM RECOVERING FOR LOSS OF PROPERTY BY THE CARRIER, A SUM IN EXCESS OF THE AMOUNT DECLARED.

It has been held legal by the Interstate Commerce Commission, and recognized by the courts to be valid also, for carriers to establish schedules of charges applicable to a specific commodity and graduated reasonably according to value. When such rates are published, shippers are entitled to the rate corresponding to the actual value of the property offered by them for transportation. Shippers are not entitled under such rates to understate the actual value of shipments, for the purpose of obtaining the rate applicable upon articles of less value. The valuation stated to the carrier should correspond with the actual value as shown by the invoice or other credible evidence. Shippers misstating the value of property for the purpose of obtaining the rate applicable to property of less value, are considered guilty of misbilling and are subject to prosecution under Section 10 of the act to regulate commerce; and where the carrier acts in collusion with the shippers to secure such unlawful end, it likewise is liable to prosecution under appropriate sections of the federal law.

Conference Ruling Int. St. Com. Com. Traffic World. Vol. 6, No. 25, p. 919, Dec. 17, 1910.

In Matter of Released Rates (13 Int. St. C. C. Rep. p. 550) the fourth paragraph of the syllabus expresses the idea of the Commission as to the lawfulness of rates fixed by valuation as follows:

> "A carrier may lawfully establish a scale of charges applicable to a specific commodity and graduated reasonably according to value. These rates must be applied in good faith, regard being had to the actual value of the property offered for shipment."

(A) *The shipper's false representation misleads the carrier to its injury and the former is estopped to claim more than the declared value.*

When a shipper declares the value of an animal for the purpose of securing a stated rate of charge, and it is received by the carrier in virtue of such declaration, without collusion or actual knowledge on the part of the latter that the value is not as declared, the shipper should not be allowed to afterwards claim that the animals were of greater value when lost or destroyed in possession of the carrier, upon the doctrine that the shipper is by such representation,—by his fraudulent conduct,—estopped from claiming a greater value.

Hart v. Penn. Ry. Co. 112 U. S. 331,
Jennings v. Smith, 106 Fed. 139,
Macfarlane v. Adams Ex. Co. 137 Fed. 982.
Taylor v. Weir, 162 Fed. 585.
Ullman v. C. & N. W. Ry. Co. 112 Wis. 150.

(B) *In understating the value and thus violating the law the shipper will not be permitted to recover a sum in excess of the declared value.*

This is on the ground that the law will not assist a plaintiff to obtain the fruits of an illegal act nor to secure an advantage over others who have complied with the law and paid the proper charges.

Section 10 of the Interstate Commerce act as amended by the act of March 2, 1889, (25 Stat. L. 855) and Section 1 of the Elkins act, approved Feb. 19, 1903, (32 Stat. L. 847) as amended by the act of June 29, 1906, (34 Stat. L. 584) make it unlawful to obtain transportation at less than the regular rate or to accept a concession whereby property is transported at less than that named in the tariffs. The statutes are slightly different in detail, but are aimed at one and the same object. Penalties are announced against both the carrier and the shipper for violation of the acts. These statutes are strong in covering every possible method by which forbidden discriminations are practiced, or rebates afforded, or preference or advantage given.

> "Courts will not aid a person whose cause of action, either upon his own showing or otherwise, appears to arise *ex turpi causa*, or from the transgression of positive law. They do not adopt this policy for the purpose of protecting a defendant, but from determination not to assist such a plaintiff."

Den. ex. Dem., Wooden v. Shotwell, 24 N. J. L. 789.

Melody v. Great Nor. Ry. Co. 127 N. W. Rep. 543. (S. D.)

Cont'l. Wall Paper Co. v. Voight & Sons Co. 212 U. S. 227, 262.

UPON CONGRESS IS BESTOWED THE POWER TO LEGISLATE UPON INTERSTATE COMMERCE AND IT HAS DONE SO, COMPREHENSIVELY AS TO RATES, SHIPPING CONTRACTS AND LIABILITY FOR LOSS. IT THEREFORE SUPERSEDES ALL STATE LAWS ON THOSE PHASES OF THE SUBJECT.

It is conceded by the opinion of the Circuit Court of Appeals rendered in this case (172 Fed. 850) that the act of congress regulating common carriers legislates upon the fixing of the rates, the issuance of bills of lading or receipts for interstate shipments, also that in so far as it does this, the act supersedes the provision of any state constitution or state law that should otherwise be considered as controlling. That is to say, upon the congress is bestowed the power to regulate commerce among the states. When that body legislates upon interstate commerce, the laws passed by it are to the exclusion of the written or unwritten laws of the several states upon a like phase of the subject.

Tullock v. Mulvane, 184 U. S. 497.

The pertinent matter of congressional action on this subject is found mainly in Sections 6 and 20 of the present Interstate Commerce law, and was therein contained at the time the respondent's alleged cause of action arose.

The first paragraph of Section 6 provides that the schedule of rates shall contain, among other things, in addition to all charges, any rules or regulations which in anywise affect or determine the rates and charges. By the 8th paragraph of Section 6 it is made unlawful to accept of any "greater or less or different compensation for such transportation of * * * property, or for any service in connection therewith,'' than the rates and charges specified in the tariff on file and in force.

By the seventh paragraph of section 6, it is likewise made unlawful for a carrier, by any device, to ''extend to any shipper any privileges or facilities * * * except such as are specified in the tariffs.''

It is also required, by section 6, paragraph one, that the carrier shall establish certain rates, and file and publish not only printed schedules of those rates, but shall also publish a statement of ''all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, the fares and charges, or the value of the service rendered to the passenger, shipper, or consignee.'' In accordance with this law, it is conceded that the petitioner Railway Company had filed and published its schedules of tariffs and regulations, a part of which, referring to this class of shipments, appears on page 46 of the record.

The shipper is conclusively presumed to know, not only the rate applicable to different valuations, but the terms and conditions under which a shipment is received by the Railroad Company, when those things are reflected in the filed and published tariffs, rules and regulations. *Texas & Pacific R. Ry. Co. v. Mugg,* 202 U. S. 242;*Texas & Pacific R. Ry. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426; *Armour Packing Co. v U. S.,* 209 U. S. 56. The shipper in this case, therefore, is conclusively presumed to have known that the rate which he sought, and which was applied to this shipment, was a rate based upon a declared value, not to exceed $100 per animal; and that if he had declared the value to be more, the rate would have been higher.

By paragraphs eleven and twelve (embracing what is known as the Carmack amendment), of Section twenty, it is required: (1) That a common carrier shall issue a receipt or a bill of lading for an interstate shipment; (2) That such carrier shall be liable to the lawful holder of such instrument for loss or injury to property, caused by it or any connecting carrier; (3) That no contract, receipt, rule or regulation, shall exempt such carrier from the liability thus imposed; (4) That when the carrier issuing the bill of lading shall have satisfied the shipper's claim for injury or loss done by a connecting line it shall have a right to recover over against such connecting carrier; (5) That no contract, receipt, rule or regulation shall exempt such carrier from liability, imposed by the act.

The amendment also carries a proviso, as follows: "Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action, which he has under existing law."

THE PROVISO TO THE CARMACK AMENDMENT HAS REFERENCE TO REMEDIES FOR THE RECOVERY OF DAMAGES AND NOT TO SUBSTANTIVE LAW DEFINING LEGAL RIGHTS, AND HENCE DOES NOT PRESERVE THE NEBRASKA LAW FORBIDDING LIMITATION OF LIABILITY; FOR, AS CONSTRUED BY THE SUPREME COURT OF NEBRASKA, SUCH LAW IS SIMPLY A RULE OF EVIDENCE AS TO DAMAGES.

While conceding that the Congress has legislated upon the subject of rates and bills of lading affecting interstate shipments, it is claimed that the proviso to the Carmack act (Par. 11, Sec. 20) saves existing remedies and rights of action, thereby continuing in full force and effect Sec. 4, of Art. XI of the Constitution of Nebraska, providing that "the liability of railroad corporations as common carriers shall never be limited;" and that the "limitation of liability" clause in the shipping contract is repugnant to this provision as interpreted by the Supreme Court of the state of Nebraska.

To this there is more than one full and complete answer.

A. *The purpose of the proviso to the Carmack Act is to save existing remedies, or causes of action, and not to create new substantive law or rules of right.*

Among other things, the Carmack Act attempts to create a new right, that is, a right in the shipper to recover from the initial carrier, notwithstanding that he delivered the shipment in good order, to a connecting carrier. The general rule is that where a statute creates a new right or prescribes a remedy, such remedy is exclusive unless the statute indicates otherwise. *Farmers' Etc. Natl. Bank v. Dearing*, 91 U. S. 29, 35. The proviso in question was added to make it clear that this statute was not intended to deprive the shipper of a right of action (a remedy) against the defaulting carrier. The statute does not read "of any remedy or *right* which he has under existing law," but uses the term "right of action," which is synonymous with remedy. It means not a substantive right, but the right to maintain an action, as has been held in numerous cases. Where the words "right of action" are used, as in this statute, they apply to the method of enforcing the claim. Such is the definition given in the Rapalje and Lawrence Law Dictionary 1132, Anderson's Law Dictionary 27, and is supported by the cases of *Hibbard v. Clark*, 56 N. H. 155, 158; *Boody v. Watson*, 64 N. H. 162; *Lumm v. Buckeye*, 45 Miss. 564, 566.

The Carmack Act is concerned alone with rights and duties embraced by the Act, and the obvious purpose of the proviso was to make plain that any specific remedy given by the Act should be cumulative for the wrongs described.

B. *The stating of the value, by the shipper of an interstate shipment, is required by law, for the purpose of finding the corresponding rate, and is not a matter of contract.*

The rights of the parties in respect to the rate charged were not fixed by the terms of the contract. The fundamental of a contract,—the meeting of minds, was lacking. The law,—the filing and publishing, as required by the Federal Commerce Act,—forced the shipper to state the value of the animals; forced the carrier to apply, and both the shipper and the carrier to abide by, the rate thus fixed by law. Neither party could legally agree to depart from the rules or regulations for fixing the rate; nor from the rate thus established. For departing therefrom or attempting to do so, carrier and shipper was each liable to prosecution and fine under pertinent sections of the Interstate Commerce Act. Knowingly under-stating the value is a fraud—a moral obliquity—which furnishes the basis of an estoppel. The defense of estoppel, in such cases, does not rest upon the contract between the parties, but upon a status or condition arising from the law and the fraud of the party against whom it is invoked. The situation is the same as though the clause limiting liability were entirely eliminated from the contract or had never been inserted therein. Without that clause, the facts justifying the application of the doctrine of estoppel *in pais* are just as strong and legally sufficient. It is clear, therefore, that the opinion of the Circuit Court of Appeals fails to meet or comprehend the real feature of the case. Determining that the contract privately made between the parties was subversive of the Nebraska Law in respect to the liability clause, did not reach the heart of the case,—did not solve the real issue, which was created by the conduct of the shipper in defying the law, in respect to the fixing of rates controlling interstate shipments, and not by contract between the parties. The shipper declared the valuation in obedience to a law of the United States, and not as a contractual obligation, but he stated the value falsely in violation of such laws.

C. *The limitation of the Constitution of Nebraska does not create a remedy, but is itself a substantive rule of law for the measurement of damages, with which the proviso to the Carmack Act does not deal.*

As construed by the Supreme Court of Nebraska, the constitutional inhibition to limiting liability in cases of this kind, does not go to the remedy, but simply creates a substantive rule of law for the measurement of damages. When the carrier injures or loses an intrastate shipment, for which recovery may legally be had in that state, the measure of damages is the full value, and no agreement for a less amount will obviate a judgment for an amount equivalent to full value. The remedy, or right of action, was not created by,—did not owe its origin to,—the Nebraska constitutional provision, but existed as a legal remedy independent and prior to the adoption thereof. The proviso to the Carmack Act sought to save an existing remedy, or right of action, that was in nowise dependent for its beginning nor its abiding, upon the Constitution of Nebraska. That proviso does not pretend to say, nor,—by any rules of legal interpretation properly applied,—can it be said, that it was intended to bar defenses recognized in the decisions of courts of the United States, of which defenses, estoppel *in pais,* and a violation of penal statutes are prominent and continuing ones.

(D) *To give the proviso to the Carmack Act the construction stated in the opinion, materially weakens, if it does not destroy, the Interstate Commerce Law in its main purpose, as applied to shipments transported at rates fixed upon value: this should be avoided if possible, and such construction be given the proviso as will uphold the main design of the Federal Commerce Law, if the words used, in their ordinary meaning, will justify that construction.*

The National Congress was moved to legislate concerning interstate commerce, moved by railway carriers, more largely, because of what was deemed unjust discrimination practiced toward favored shippers, and favored communities; and because of rebates and advantages furnished the same classes. Had it not been for the intolerant feeling for such ways of performing the public duties of a common carrier, it is doubtful if the Interstate Commerce Law would have been originally enacted and amended at various times, to reach its present structural perfection.

Having the prime purpose in mind, of doing away with evils, flowing from certain kinds of discrimination—from rebates, preferences, or prejudices, to favored shippers or localities, it is inconceivable that the National Congress, in legislating upon interstate commerce would purposely save the application of existing state laws, which would directly preserve those evils. It is just as inconceivable that the Congress would legislate so as to permit, indirectly, what it would not permit directly; yet the interpretation insisted upon for the proviso to the Carmack Act, induces indirectly the continuance of the very evils that Congress for years has sought to obliterate. This proviso, as construed by the Circuit Court of Appeals, is as a knife planted in the heart of the entire act, which may sooner or later destroy its efficacy for the very purposes it was intended to subserve.

By construing the proviso to the Carmack Act so that it has the effect to apply the Nebraska law, in a manner to permit a deceitful shipper, while violating a Federal Law, to profit by his own dishonor, the rejuvenation and renewal of the old-time methods for giving rebates, advantages, preferences, and of affording discrimination, directly or through device or subterfuge is brought about: for, as in this case, a shipper can falsely declare and underestimate the value of his shipment, and thereby secure a correspondingly low rate,—a much lower rate than he is entitled to—and lower than the shipper, who having regard for his own self-respect, as well as the law, states the true value of his property.

The shipper thus fraudulently declaring the value, not only gains a rate to which he is not entitled, but in case of loss of property shipped, often obtains its full value, as in this case enormously above the value declared—thereby securing a discriminating rate, as well as a rebate, and under the law, as found in the opinion of the Circuit Court of Appeals, it is proper and legal that the carrier should submit to the iniquitous demand of such shipper, and pay the amount of money claimed as the actual value of the property in case of loss, since the law commands it.

Again, a shipper from Illinois to a point in Nebraska, finds that by the laws of the former state, he is not privileged to declare one value,—a false and depreciated value—for rate-making purpose, and thereafter recover a greatly increased value, if it shall come about that the property is lost by the carrier; by the law of Illinois, no such premium is afforded for fraudulent conduct of that character. The value declared is the value that controls in a suit to recover damages, as well as for the fixing of rates in that state,—contrary to the rule that would prevail if the shipment had originated in Nebraska for transportation to a point in Illinois.

Is it fair or reasonable to believe that the Congress designed to loosen,—to disintegrate—the law in respect to shipments of this character, while remaining invulnerable and forbidding to wrong-doing in other respects? Did it mean to open the flood-gates and to permit rebating and discrimination to flow through, with like freedom as in years preceding the enactment of the Interstate Commerce Law? If not, why should not the proviso, giving the words thereof, their natural import and meaning, be construed rather to save the important purposes of the act as herein outlined so as to apply to shipments, the rate for moving which, is determined from the value, as in this case. Treating the proviso as saving existing remedies—the methods for enforcing rights—against any carrier actually in default prevents such impending disorder and destruction. It is certainly more consonant with reasonable interpretation that Congress intended that dishonesty of a shipper in a matter of this kind should be treated as the common law has ever treated it,—as the unwritten law of the courts of the United States has ever treated,—as a bar to a shipper from profiting by his own fraud.

WHETHER THE DEFENSE OF THIS CASE IS BASED EXCLUSIVELY UPON ESTOPPEL, ON ACCOUNT OF ORAL MISREPRESENTATION, OR UPON THE FACT SOLELY THAT THE PLAINTIFF BY HIS VIOLATION OF A PENAL STATUTE HAS PLACED HIMSELF IN A POSITION WHERE THE COURTS REFUSE TO AID A PARTY TO REALIZE THE FRUITS OF A CRIMINAL ACT,—IN EITHER CASE IT IS COMPLETE.

The Circuit Court of Appeals, in its opinion, seemed only to consider the enforcement of the contract, which is quite beside the question. The law of Congress, the rules, regulations and tariffs of the Railway Company, and the wrong-doing of the respondent, were all independent of the contract.

This court has considered estoppel *in pais* as a defense,—as one outside of the construction of contract; it is one of general law. The courts of the United States have always applied the doctrine of estoppel, the facts warranting, to prevent fraud and imposition. Even if the constitutional provision of the state of Nebraska prevented the enforcement of a contract limiting liability, it would not, and ought not to be construed as permitting the shipper to profit by his false representations. It ought not to be construed so as to allow the shipper to *perpetrate* a fraud. In respect to the representation made in the contract as to value there was no illegality except in its falsity. No public policy is violated in requiring the shipper to declare the value of the article shipped for the purpose of determining the rate. Good faith and fair dealing require that he shall be bound by the representations which have advantaged him, as was said by this court in the case of *Hart v. Penn. R. R. Co.* 112 U. S. 331.

> "If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assume, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed.. 2 Kent's Comm. 603, and cases cited: *Relf v. Rapp,* 3 Watts & Sergeant, 21; *Dunlap v. International Steamboat Co.,* 98 Mass. 371; *Railroad Co. v. Fraloff,* 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss."

Public policy is also viciously assailed when one, through his very act of violating a penal statute, seeks to procure an advantage through the administration of the law, which in good conscience he should not enjoy. The plaintiff is in court making his demand and conceding his illegal act, as measured by the laws of the United States. It is from this tainted act that he seeks to enjoy beneficial results which ought not to be permitted to him.

Carl C. Wright,
Benjamin T. White,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,
vs.
BUD R. LATTA,
Respondent.

231
No. [redacted]

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CARL C. WRIGHT,
BENJAMIN T. WHITE,
Counsel for Petitioner.

REED PRINTING COMPANY

SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

In view of the conceded power vested in this court to exercise discretion in the granting of a writ of this kind, the importance of the questions involved, the fact that one of the cases cited in respondent's brief to sustain his contention (*Miller v. Chicago, Burlington, etc. R. Co.,* 85 Nebr., 458), is now pending in this court on error proceedings to the Supreme Court of the State of Nebraska, and practically embraces the same questions as are raised here, it would seem just that this court should receive the case at bar and consider it on the merits in connection with that case.

In the following we desire simply to direct the attention of the court to the point, made in respondent's brief, that the petition for *certiorari* comes too late. It may be that this court would have permitted the writ to issue when the opinion of the Circuit Court of appeals was rendered reversing the first judgment; but it seems to admit at least of a doubt whether such an application would have been entertained or granted, since the order or judgment of reversal *contained a direction remanding the case for new trial.*

In the case of *Chicago & North Western Ry. Co. v. Osborn,* (146 U. S., 354). Chief Justice Fuller in denying the application bases such denial of the writ on authority of certain cases referred to, in all of which the relief prayed was denied *because the order or judgment sought to be reviewed was not final.* True, the applications in the cases considered in that opinion were not for writ of certiorari, but nothwithstanding that, the case is significant for it clearly implies that the practice in that respect should be the same as on application for writ of error or appeal.

See also *Taylor v. Louisville & Nashville R. R. Co.,* 172 U. S., 647.

Forsyth v. Hammond, 166 U. S., 506, 514. Although this case does not follow that general rule, it clearly affirms its application (see p. 514) to a case like the one at bar. That is, it clearly recognizes the *general rule* that a writ will not be issued *in cases where there being only a matter of private interest, there has been no final judgment in the Circuit Court of Appeals.*

Again, it was deemed wise to exhaust all proper efforts before the Circuit Court of Appeals so, that if it became necessary to come to this court it could not be urged by counsel, as it doubtless would have been, that the record did not present, fully to the Circuit Court of Appeals on the first hearing all the questions that are now raised. In the opinion of that court the feature of the case, considered as controlling, was the asserted contractual relation which it was claimed sinned against the constitutional provision of Nebraska forbidding limitation of liability by railroad companies as common carriers. In fact the entire force of the opinion seems to have been directed to the alleged iniquity of an agreement privately made.

On the first trial, the admission of exhibit 3 (record p. 46) was denied, and it was this exhibit which disclosed the rules and regulations and the method of arriving at charges for transportation of a shipment of the kind in question. This exhibit was on file with the Interstate Commerce Commission, and by that fact became a part of the rules and regulations and the tariff authorized by law. None other could have been applied, and it therefore created a condition or status which could not have been altered, added to, or taken from, by any agreement of the parties. Notwithstanding an agreement entered into by counsel at the trial as to the tariffs, schedules and rates in force being on file with the Interstate Commerce Commission (record p. 45), inasmuch as exhibit 3, was refused admission as evidence, neither the exhibit nor the purpose for which it was offered, was considered by the court upon the first hearing so far as its opinion discloses.

On the second trial, however, exhibit 3 was admitted, and was before the trial court and the circuit court of appeals, for the very purpose intended by the petitioner herein, that is, to show what rules, regulations and tariffs were legally in force, controlling the charge made for transporting the shipment. Therefore, on the second hearing before the Circuit Court of Appeals it had before it an item of evidence clearly establishing, and illustrating the status, that existed between the carrier and the shipper, fixed and in force by the laws of the United States and not by an agreement of the parties breathing defiance of the Nebraska constitutional provision.

Respectfully submitted,

Carl C. Wright,
Benjamin T. White,
Counsel for Petitioner.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY *v.* LATTA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 231. Argued March 8, 11, 1912; reargued October 22, 23, 1912.—Decided January 6, 1913.

Decided on authority of *Adams Express Company* v. *Croninger, ante,* p. 491, and *C., B. & Q. Ry.* v. *Miller, ante,* p. 513.
172 Fed. Rep. 850, reversed.

THE facts, which involve the validity under the Carmack Amendment of schedules of tariff rates based upon values, and the extent of the liability of carriers under bills of lading, are stated in the opinion.

Mr. James B. Sheean for petitioner.

Mr. H. C. Brome for respondent.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action to recover the full value of two horses lost in the course of interstate transportation.

The defense in substance was that the plaintiff had declared the value of each of the animals to not exceed one hundred dollars, and had signed a shipping contract wherein he agreed that that was the value and that the company's liability in case of loss or damage should not exceed the agreed value. It was also shown that the schedule of tariff rates was based upon values and that a higher rate was allowable if a higher value had been declared. It was claimed that a limitation of liability made for the purpose of obtaining the lower of alternative rates was admissible under the provisions of § 20 of the Interstate Commerce Act of June 29, 1906, 34 Stat. 584, c. 3591.

The Circuit Court instructed a verdict for the agreed value, ruling that the contract was valid and was controlled by the Interstate Commerce Acts. The Circuit Court of Appeals reversed this judgment, upon the ground that the contract was invalid under the constitution of the State of Nebraska, and held the plaintiff entitled to recover the full value of the animals. 172 Fed. Rep. 850. The case was remanded to the Circuit Court, where, in pursuance of the judgment and opinion of the Circuit Court of Appeals, the jury was instructed that it should find the actual value of the animals lost and return a verdict for that amount. Upon a second writ of error this judgment was affirmed by the Circuit Court of Appeals, and the cause has come to this court upon a writ of certiorari.

The case is governed by the cases of *Adams Express Company* v. *Croninger*, and *C., B. & Q. Ry.* v. *Miller*, both just decided.

Judgment reversed and the case is remanded for a new trial.